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Supreme Court of the United States

OCTOBER TERM, 1936

No. 139

THE PEOPLE OF THE STATE OF NEW YORK, UPON THE RELATION OF RICHARD REID ROGERS, APPELLANT,

vs.

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS, CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED JUNE 26, 1936.

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Supreme Court

OF THE STATE OF NEW YORK,

APPELLATE DIVISION—THIRD DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS,

Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Respondents.

Statement Under Rule 234.

This proceeding was commenced by the service on the respondents of a notice of motion dated April 16, 1935, for an order directing the issuance of a writ of certiorari. The order was entered upon consent on the 26th day of April, 1935, and the writ of certiorari was allowed and issued on the same day.

The writ of certiorari was served upon the respondents and service thereof acknowledged on April 29, 1935. The respondents filed their return to said writ in the office of the Clerk of Albany County on May 13, 1935.

4 *Statement Under Rule 234.*

The relator herein appeared in person on his own behalf. The respondents herein appeared by John J. Bennett, Jr., Esq., Attorney General of the State of New York. There has been no change of attorneys or parties herein.

Petition for Certiorari.

SUPREME COURT,

ALBANY COUNTY.

5

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS, Relator, against MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York, Respondents.	Income Tax for the years 1927, 1928 and 1929.

6

The petition of Richard Reid Rogers respectfully shows:

FIRST: The petitioner at the time hereinafter mentioned resided in the City, County and State of New York.

SECOND: The defendants are the Commissioners constituting the Tax Commission of the State of New York.

THIRD: For each of the years 1927, 1928 and 1929 the petitioner duly made a personal income tax return, pursuant to the Tax Law of the State of New York and Section 367 thereof, and paid to the Tax Commissioners the amount of tax payable as the same appeared from the face of each of such returns.

FOURTH: The State Tax Commission recomputed the petitioner's tax for the aforesaid years of 1927, 1928 and 1929 and assessed against the petitioner, under date of February 13, 1931, additional taxes as follows:

Assessment Number	*Year*	*Amount*
504301	1927	$300.00
504302	1928	300.00
504303	1929	290.00

FIFTH: Thereafter, and on or about February 14, 1931, the petitioner duly made application, pursuant to Section 374 of the Tax Law, for a revision of the foregoing assessments, and on the 30th day of March, 1935, the Tax Commission 9
made its determination denying said application. A copy of said determination is hereto annexed, marked Schedule A.

SIXTH: Petitioner is advised, and on information and belief alleges, that such determination is erroneous, inasmuch as the additional tax computed and charged by the State Tax Commission

for the years aforesaid was a tax to cover the annual salary for the said years paid respondent by the Panama Rail Road Company, which said company is a wholly-owned and controlled instrumentality of the United States Government engaged in the construction, operation and maintenance of the Panama Canal; that the Congress of the United States has never consented to the taxation thereof, or of the salaries paid its officers, by the State of New York; and that by reason thereof, under the Constitution of the United States, the said Rail Road Company and the salaries paid to its necessary officers and employees are exempt from state
11 income taxation.

SEVENTH: Petitioner has heretofore deposited with and paid to the Tax Commission under protest the full amount of the taxes, interest and other charges audited and stated in such determination and has duly filed an undertaking for costs and charges approved by a Justice of the Supreme Court in compliance with the provisions of Section 375 of the Tax Law.

EIGHTH: No previous application for the writ herein sought has been made to any court or judge.

12 WHEREFORE, the petitioner prays that the said determination of the State Tax Commission may be reviewed and said assessment vacated and that a writ of certiorari may issue out of this Court to the defendants as Commissioners constituting the State Tax Commission of the State of New York, commanding them to make return to said writ pur-

suant to law, and that the petitioner may have such other and further order or relief as may be proper.

Dated, New York, N. Y., April 16, 1935.

RICHARD REID ROGERS,
Petitioner.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

RICHARD REID ROGERS, the petitioner above named, being duly sworn, says that he has read the foregoing petition and is acquainted with the facts alleged therein, and that the same is true to his knowledge, except as to matters therein stated on information and belief, and that as to those matters he believes it to be true.

RICHARD REID ROGERS.

Sworn to before me this
16th day of April, 1935.

ANDERSON WOODS,
Notary Public,
(Seal) Kings County No. 334.
Cert. filed in N. Y. County No. 211.
Cert. filed in Orange County.
Commission expires March 30, 1937.

16 **Schedule A to Petition.**

DETERMINATION OF STATE TAX COMMISSION.

STATE OF NEW YORK,

THE STATE TAX COMMISSION.

IN THE MATTER OF The application for revision of additional taxes assessed against RICHARD REID ROGERS for the years 1927-1928 and 1929.

17

Returns of income on behalf of the above named taxpayer for the taxable years 1927, 1928 and 1929 having been duly filed at the times when required by statute in accordance with the provisions of Article 16 of the Tax Law; and on audit of such returns, additional taxes having been found due for such periods in the amounts of $300 for the year 1927, which tax was duly assessed under date of February 13th, 1931, assessment notice No. 504301, and in the amount of $300 for the taxable year 1928 assessed under date of February 13th, 1931, assessment No. 504302, and in the amount of

18

$290 for the taxable year 1929 assessed under date of February 13th, 1931, assessment notice No. 504303, all of which taxes were duly paid under date of February 26th, 1931, and the taxpayer having duly made application under Section 374 of the Tax Law for recomputation and revision of such assessments; and the matter having come on for formal hearing before Honorable Cortland A.

Wilber, a Deputy State Tax Commissioner, duly designated under the provisions of Section 171 of the Tax Law to hold formal hearings, at the office of the Commission, 80 Centre Street, New York City, on the 26th day of February, 1935; and the taxpayer having appeared in person and given oral testimony and the taxpayer having filed an affidavit duly verified under date of December 15th, 1934, together with a memorandum in his own behalf and others, which affidavit and memorandum and the minutes of said hearing are made a part of the record herein; and all the questions of law and fact present having been duly considered by the Commission, it is

DETERMINED: That the computation of the additional taxes against said taxpayer for the years 1927, 1928 and 1929, respectively, in accordance with the audit of said returns was correct; and that the additional taxes so stated were properly assessed and due; and do not include any taxes or other charges which should not have been lawfully demanded, and that no payments have been illegally made or exacted thereupon; and that the taxpayer is not entitled to any further resettlement of the taxes so assessed.

Dated, Albany, N. Y., March 30, 1935.

THE STATE TAX COMMISSION,
MARK GRAVES,
Commissioner.
JOHN P. HENNESSEY,
Commissioner.

22

Order Granting Certiorari.

At a Special Term of the Supreme Court held in and for the County of Albany at the County Court House in the City of Albany on the 26th day of April, 1935.

Present: GILBERT V. SCHENCK, *Justice*.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS, Relator, against MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York, Respondents.	Income Tax for the years 1927, 1928 and 1929.

23

On reading and filing the petition of Richard Reid Rogers, verified the 16th day of April, 1935, notice of the application and proof of service of said petition and notice having been made upon the State Tax Commission, and upon proof of filing

24 with said Tax Commission an undertaking duly approved by a Justice of the Supreme Court to the effect that if the writ of certiorari applied for in the above entitled proceeding is dismissed, or the determination of the Commission confirmed, the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of the writ, including costs of all appeals, and the

petitioner having deposited with the State Tax Commission the full amount of taxes, percentage, interest and other charges audited and stated against it, and it appearing that John J. Bennett, Jr., Attorney General of the State of New York and attorney for the State Tax Commission, has duly consented to the granting of a writ of certiorari as prayed for in said petition;

NOW, on motion of Richard Reid Rogers, the petioner, appearing in person for said petition, it is

ORDERED that a writ of certiorari be issued out of and under the seal of this Court as prayed for in said petition directed to Mark Graves, John J. Merrill and John P. Hennessey, constituting the State Tax Commission of the State of New York, returnable at the office of the clerk of the Supreme Court in and for the County of Albany within twenty days after the service thereof, to review the taxation set forth in the petition herein.

Enter,

GILBERT V. SCHENCK,
J. S. C.

Consent is hereby given to the entry of the within order granting writ of certiorari.

Dated, April 26, 1935.

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for State Tax Commission.

RICHARD REID ROGERS,
Petitioner in Person.

28 **Writ of Certiorari.**

SUPREME COURT,

STATE OF NEW YORK,

COUNTY OF ALBANY.

[SAME TITLE.]

WHEREAS, we have been informed by the petition of Richard Reid Rogers, verified the 16th day of April, 1935, that theretofore the State Tax Commission recomputed the personal income tax of the petitioner for the years 1927, 1928 and 1929, and
29 assessed against the petitioner, under date of February 13, 1931, additional taxes amounting for the year 1927 to $300.00, for the year 1928 to $300.00, and for the year 1929 to $290.00, and that thereafter and upon the application for the revision of said assessment the said Commission did, on the 30th day of March, 1935, make its determination denying the said application and confirming said assessment in the amounts above stated, and

WHEREAS, it is alleged by the petition that in imposing said additional tax and thereafter confirming same, injustice has been done to said Richard Reid Rogers, the petitioner herein, and that said tax so imposed as aforesaid is erroneous and
30 illegal and we being willing to be certified of your proceedings in the premises as such Tax Commission in imposing and exacting such tax, and in all things relating thereto do command you to certify and return to the office of the County Clerk of the County of Albany, within twenty days after service of this writ upon you, all and singular the accounts and all the evidence before you upon the

application for revision and readjustment of said tax, and all and singular your proceedings, decisions and actions in the premises, with the dates thereof, and all the accounts, affidavits and all the evidence submitted to you or which were before you in, of or concerning the said matter or matters of the said account for taxes aforesaid against said Richard Reid Rogers, to the end that said account or accounts, revision or readjustment thereof, and your decision or decisions thereon, may be revised and corrected by this court according to law.

WITNESS, HON. GILBERT V. SCHENCK, Justice of the Supreme Court, at the County Court House in the City of Albany, this 26th day of April, 1935.

JOHN A. KNOX,
Clerk.

The foregoing writ of certiorari allowed this 26th day of April, 1935.

GILBERT V. SCHENCK,
Justice.

Return of State Tax Commission.

SUPREME COURT,

ALBANY COUNTY.

[SAME TITLE.]

The respondents above named, obedient to an order and writ of certiorari, granted herein by Mr.

34 *Return of State Tax Commission.*

Justice Gilbert V. Schenck on the 26th day of April, 1935, hereby make return thereto consisting of all and singular the accounts and the evidence before them upon the application for revision and readjustment of certain assessments of income tax against the relator for the calendar years 1927, 1928 and 1929, and all and singular their proceedings, decisions and actions and all the accounts, affidavits and evidence which were submitted to or which were before them in, of or concerning the said assessments of income tax, as follows:

35 Exhibit (1) New York State income tax resident return of Richard Reid Rogers for the calendar year 1927.

(2) New York State income tax resident return of Richard Reid Rogers for the calendar year 1928.

(3) New York State income tax resident return of Richard Reid Rogers for the calendar year 1929.

(4) Notice of additional assessment of income tax, Notice No. 504301, dated February 13, 1931, amount $300.

(5) Notice of additional assessment of income tax, Notice No. 504302, dated February 13, 1931, amount $300.

36 (6) Notice of additional assessment of income tax, Notice No. 504303, dated February 13, 1931, amount $290.

(7) Transcript of testimony, hearing held at New York City February 26, 1935.

(8) Affidavit of Richard Reid Rogers, verified December 15, 1934, to which

are appended Exhibits Nos. 1 to 7, inclusive.

(9) Determination of the State Tax Commission, bearing date March 30, 1935.

Respondents deny each and every allegation in the petition herein, except in so far as the same are shown to be true by this return.

Respondents allege that the taxes imposed herein were justly and legally imposed under the laws of the State of New York.

IN WITNESS WHEREOF, the State Tax Commission hereunto sets its hand and seal this 9th day of May, 1935.

STATE TAX COMMISSION,
By MARK GRAVES,
President.
JOHN J. MERRILL,
Commissioner.

Stipulation as to Exhibits 1 to 6 to Return.

SUPREME COURT,

ALBANY COUNTY.

[SAME TITLE.]

IT IS HEREBY STIPULATED, by and between the respective parties hereto, that the matters pertinent to this proceeding, in Exhibits 1 to 6, inclusive, set

40 *Stipulation as to Exhibits 1 to 6 to Return.*

forth in the return of the respondents to the order of certiorari herein, are as follows:

1. In relator's income tax return for the calendar year 1927, he reported as "non-taxable income" the sum of $15,000 as "compensation paid by U. S. A. through Panama Railroad Co., an exclusive government agency." No tax was paid thereon.

2. In relator's income tax return for the calendar year 1928, he reported as "non-taxable income" the sum of $15,000 as "Sal. paid by Panama Railroad, a wholly controlled
41 U. S. Government agency." No tax was paid thereon.

3. In relator's income tax return for the calendar year 1929, he reported as "non-taxable income" the sum of $15,000 as "Salary paid by the Panama Railroad Co., an exclusive agency of the United States Government." No tax was paid thereon.

4. Under date of February 13, 1931, the relator was, as shown in the determination of the Tax Commission, assessed an additional tax of $300 for the calendar year 1927, an additional tax of $300 for the calendar year 1928,
42 and an additional tax of $290 for the calendar year 1929; all of which assessments were paid by the relator under date of February 26, 1931, as set forth in the determination of the Tax Commission. (Exhibit 9 of Return.)

5. The additional taxes assessed against relator as aforesaid were assessed solely upon the salaries paid relator by the Panama Rail

Road Company for the respective years upon the ground, as set forth in said notices, that such salaries were considered taxable.

6. It is further stipulated that the said Exhibits 1 to 6, inclusive, need not be printed in the record in this proceeding, and that this stipulation be printed in place and stead thereof.

Dated, May 21st, 1935.

RICHARD REID ROGERS,
Attorney for Relator.

JOHN J. BENNETT, JR.,
Attorney General,
Attorney for Respondents.

46

Exhibit 7 to Return.

Transcript of Testimony.

IN THE MATTER

OF

The application of RICHARD REID ROGERS under Section 374 of the Tax Law for revision and readjustment of additional assessments #504301, #504302 and #504303 for the taxable years 1927, 1928 and 1929.

47

FORMAL HEARING.

New York City, February 26, 1935.

PRESENT:

MR. CORTLAND A. WILBER, Deputy Commissioner, Income Tax Bureau.

MR. ROY H. PALMER, First Assistant Director, Income Tax Bureau.

APPEARANCE:

MR. RICHARD REID ROGERS, 74 Trinity Place, New York City.

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Mr. Palmer: There have been put into evidence heretofore the income tax returns of Mr. Rogers for the years in question together with affidavits filed by Mr. Rogers and all correspondence pursuant thereto, so that we will consider the file or such material as is pertinent as a part of this record.

(Mr. Richard Reid Rogers sworn by Commissioner Wilber.)

Mr. Palmer to Mr. Rogers: Mr. Rogers, you are the taxpayer in this matter. You are the general counsel of the Panama Rail Road Company? A. Yes, sir.

Q. And briefly restating the facts which are before us, it is your contention that the salary or other compensation which is paid you by the Panama Rail Road Company does not constitute a part of your gross income taxable under the income tax law of the State of New York on the theory that the Panama Rail Road Company is an instrumentality of the United States? A. Yes, except there is no other compensation outside of the salary.

Q. In supplementing the affidavits which you have already filed and which contain much information I would like to ask you questions relative to certain methods of operation of the Panama Rail Road and the method of paying its employees. The Panama Rail Road Company does a general transportation business, does it not, Mr. Rogers? A. Yes.

Q. You are familiar entirely with all its methods of doing business? A. Practically.

Q. It has its principal office in the City of New York? A. Yes, the president, however, is located on the Isthmus of Panama.

Q. And it has offices there? A. Yes.

Q. It operates a railroad across the Isthmus and operates steamers between New York and what points? A. The only points between which the steamers operate at the present time are between New York and Cristobal, Canal Zone. However, I think they have a stoppage at Haiti, some of the ships.

Q. What was the case in these years—1927, 1928 and 1929? A. I don't think they went to Haiti:

52 *Exhibit 7 to Return—Testimony.*

only to the Canal Zone. I am not sure as to these years covered by this inquiry. Ships were at one time temporarily operated from the Canal Zone to distribute cargo in South America.

Q. Does the Company operate any steamers from the Canal Zone to California? A. No.

Q. What does it do with its freight and with the passengers it transports from New York to Panama Zone, or Canal Zone, who are traveling to California or freight being transported? A. They merely transport freight and passengers to Panama or the Canal Zone itself.

53 Q. They take no freight for the Western coast? A. No, they have no arrangements with Pacific carriers.

Q. How large an office do they operate in New York, does the Company? A. You mean the number of employees?

Q. Yes, the number of employees. A. I imagine there must be in the office itself, I would say, nearly 100 employees, just a guess. In addition to that they have dock engineers and men who check the cargo and freight clerks and others of that sort and passenger agents who handle their business.

Q. The title to the dock is in the name of the corporation? A. It is leased from the City of New York in the name of the corporation.

54 Q. Does it occupy its own office building in New York? A. No, it does not. It rents space.

Q. Does the Government guarantee the lease of the dock or the office? A. No, the Government doesn't guarantee the lease of the office but my impression is that the lease of the dock is secured by deposit of collateral.

Q. Of the corporation's collateral? A. Yes; the corporation's collateral, of course.

Q. Has the corporation any office in Washington? A. No, they have no office of their own in Washington but there is a very close connection between the Panama Rail Road Company and the Isthmus Canal Zone Commission and the Chief of Office of the Panama Canal also handles business there, such as it is, of the Panama Rail Road Company. He is also Director.

Q. Does the corporation solicit freight or passenger business? A. Yes, in a way.

Q. Through advertising? A. No, it doesn't do it through advertising.

Q. Through agents? A. I think I ought to state, if you have no objection, just what the function of this steamship line is. The steamship line has been maintained for many years under the policy of administration as a necessary line of communication between continental United States and the Canal Zone. The Panama Rail Road Company conducts a Commissary Department upon the Isthmus. It is selected for that purpose for accounting reasons, because of considerable facility as contrasted with the accounting methods of the Government. Originally the receipts from everything the Government operates has to be paid in to the treasury and then reappropriated. It also affords a concession of 25% for government freight, and other concessions to the employees of the Government. It brings the employees of the railroad company and of the Commission to the United States upon their annual vacations due to the climate. They are transported here for $20 a passage, occasionally; never at over $30; so the greater portion of the service between New York and the Canal Zone is taken up with the transfer of Government freight and Government employees. Outside of that there is a certain amount of which you might call commercial busi-

ness. There are people who travel there and pay full passage on steamers, and as there is always more space available than the Government cargo occupies, outside cargo is then handled like any other steamship would handle it.

Q. The corporation charges the Government for freight, for transporting freight? A. They charge the Government 75% of the regular tariff rates and they charge the Government employees from $20 to $30. That is in both cases very much less than the actual cost of service. The steamship line has been operated at a deficit for a number of years but it is necessary to maintain it, to have this line of communication. It is the policy of the Government that we should control that line of communication.

Q. Didn't I read in the paper that the Panama Rail Road Company had declared a dividend? A. They declared a dividend of practically everything they earned; they declared it over to the Government of the United States.

Q. They must have earnings to do that. A. Yes, they always have earnings.

Q. What do you mean, they operate at a deficit? A. I mean the steamship line. The other lines of activity offset this deficit.

Q. How many steamers do they own and operate? A. Four.

Q. Do they lease any? A. No. Two of the steamers were bought by the Government of the United States by special appropriation, and at other times ships have been bought for the Rail Road Company by Government appropriations. When the operation of the Rail Road Company ceases they are to be turned over to the Government.

Q. How is the regular tariff for the transportation of freight and passengers fixed? A. Well, that is fixed to conform in a general way with the tariffs of other lines.

Q. So that relatively the charge made for transportation of freight and passengers is about the same as that charged by any other transportation line? A. Yes; except with respect to these Government employees and Government freight.

Q. Yes, and as for the charges on the Isthmus itself, do you carry much freight there aside from the Government freight? A. No, I don't think there is very much freight carried there; but what happens is this, a great many ships which use the Canal split the cargoes when they go there. They may have cargoes, some for the United States and some for South America, and they have to avail themselves of the facilities on the Isthmus owned and operated by the railroad. There is a great deal of that done in that way.

Q. The rates there do not have to be fixed by competition at all? A. The rates are not fixed by competition except where there is a rate fixed in connection with some other line, when they get a certain division of the through rates to cover the transfer across the Isthmus.

Q. Now, how are the salaries of the employees and the officials of the Company paid? A. They are paid by checks of the Panama Rail Road Company.

Q. Not by the Government? A. Not by the Government except in a sense the Government owns the Panama Rail Road Company.

Q. They are paid out of the moneys that flow in from the operation of the Company itself? A. Yes.

Q. Those checks do not have to be signed or endorsed by any Government official? A. No.

Q. Now, in case of an action for damages which might lie against the corporation, would there be any liability of the United States Government? A. There is not, simply because the United States Government under various acts of Congress has excluded immunity for the Panama Rail Road Company, the idea being that damages for personal injuries, of which there are quite a number, are part of the operating cost and should be treated as such and paid out of the funds of the Company.

65 Q. Assuming the corporation was operating at a deficit and had no available funds, judgments for damages against the corporation could not be collected from the Government? A. I don't suppose it could; but what has happened heretofore, even in the case of Panama Rail Road Company employees, there have been from time to time specific appropriations of Congress to cover that. That was in the early stage. It is now covered by general law.

Q. When a vacancy occurs in the Board of Directors of the corporation how is it filled? A. It is practically filled by the Secretary of War, that is to say, recommendations may be made to him of this, that or the other man to fill the position, but

66 when the approval of the Secretary of War is received, then he is elected to office.

Q. That, of course, is not an essential requirement of law or by-laws of the Company? A. It isn't an essential requirement, it is simply because Congress who owns the stock has decreed that the Secretary of War shall exercise all functions in connection with acts of Congress relating to the Railroad.

Q. I assume the Board of Directors meet at regular intervals? A. Yes.

Q. Take the same action as the Board of any other corporation would do? A. They do.

Q. I assume they meet and elect a director ordinarily to succeed one who has resigned? A. This form is put through. The Board of Directors invariably take the matter up of the selection of the director with the Secretary of War as representing the sole stockholder, the Government.

Q. I think that covers the question I wanted to bring out, Mr. Rogers. A. I don't think there is anything I haven't set forth in the affidavit or by reference to different acts of Congress, which I think is the main thing.

Q. I assume that if we should make a determination against you, that all of those matters would be in your brief. A. They would all be in the brief and I believe I have already filed with you a memorandum of law. If I correctly understand the law, the main issue here is whether the Panama Rail Road Company is really an instrumentality of the Government of the United States in connection with the operation of the Panama Canal. I further understand that if that is the fact the salaries of the officials should be exempt, and the case really rests upon *McCullough* v. *Maryland*. There, Chief Justice Marshall held the States could not tax the Bank of United States although the Bank of United States was organized by private individuals and was likewise engaged in operations for profit. That is the principal point upon which we rely. That will be a matter for argument and brief.

Q. We have completed the record.

70 **Exhibit 8 to Return.**

Affidavit of Relator.

BEFORE THE

STATE BOARD OF TAX COMMISSIONERS.

IN THE MATTER OF Application for exemption of WILLIAM R. PFIZER, VICTOR M. NEWTON and RICHARD REID ROGERS of state income taxes upon fixed salaries paid them by the Panama Rail Road Company.

71

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

The affiant, Richard Reid Rogers, being duly sworn, deposes and says:

1. He is and has been for many years an officer, to-wit, General Counsel, of the Panama Rail Road Company, under a fixed salary per annum as hereinafter shown.

72 2. The Panama Rail Road Company is a corporation organized under Chapter 284 of the Laws of the State of New York of 1849. Pursuant to the treaty between the United States and the Republic of Panama dated February 26, 1904, the United States in that year acquired, for the sum of $40,000,000, from the French Canal Company, all of its properties and rights upon the Isthmus of Panama, including ninety-eight and one-half per-

centum (98½%) of the capital stock of the Panama Rail Road Company; and immediately thereafter acquired the remaining one and one-half per-centum (1½%) of such capital stock; so that the Government of the United States is now and has been from substantially the beginning of its control and construction of the Panama Canal the sole owner of all of the capital stock of the railroad company.

3. The directorate of the Panama Rail Road Company consists of thirteen members. Each director has one qualifying share, but, upon death or resignation, this share, under a previous agreement, is turned over to the Government of the United States for the purpose of qualifying his successor in office. All dividends upon the stock, including the directors' qualifying shares, are paid over directly to the Government of the United States.

4. The Panama Rail Road Company operates a railroad across the Isthmus of Panama, conducts a commissary establishment for the benefit of the personnel of the Panama Canal, the Panama Rail Road Company and of the armed forces of the United States upon the Isthmus, and operates a dairy and two hotels, in connection therewith. It also, for the purpose of maintaining an independent and wholly-controlled line of communication between the United States and the Canal Zone, operates a line of steamships between New York and Cristobal, Canal Zone. These ships afford the personnel of the Panama Canal and the Panama Rail Road Company transportation to and from the United States at the nominal rate of from Twenty

Dollars ($20.00) to Thirty Dollars ($30.00) per trip, and carry freight for the Government of the United States to the Canal Zone at twenty-five per-centum (25%) less than the customary tariff rates. Over five thousand tickets for employees of the Government on the Isthmus of Panama, including employees of the Canal and of the Panama Rail Road Company, are sold annually by the railroad company at the reduced rates above referred to.

5. In addition to the various Acts of Congress bearing upon the status of the Panama Rail Road Company as a Government Agency, of which the
77 Commission or Court may take judicial notice, reference is made to the following Executive Orders and rulings of the officers of the Departments of the Government of the United States:

(a) Under the temporary Economy Act of June 30, 1932, (being Part II of the Legislative Appropriations Act for 1933; 47 Stat. 399), the Government having provided for a compulsory furlough without salary of all Government employees for the fiscal year ending June 30, 1933, and having defined "employee" to mean "any person rendering service in or under any branch of service of the United States Government," the President of the United States, under an order dated July 25, 1932,
78 provided, in the case of Panama Rail Road Company employees, for an equal distribution of the enforced furlough throughout the twelve months of the year; thus, in effect, reducing their monthly pay eight and one-third percentum (8⅓%).

(b) The temporary Economy Act, section 108, 47 Stat. 402, and the later Economy Act, Section 4, 47 Stat. 1513, having provided that in corpora-

tions a majority of the stock of which is owned by the United States Government, the holders of the stock on behalf of the United States Government should take such action as might be necessary to comply with the provisions of the Economy Act, resolutions were thereafter passed by the directors of the Panama Rail Road Company, under the direction of the Secretary of War, reducing the pay of the personnel and officers of the Panama Rail Road Company to conform to the provisions of the Economy Act.

(c) There are annexed hereto and made a part hereof copies of the following:

Exhibit 1: Excerpt from order of the President dated May 9, 1904, providing for the construction of the Panama Canal and among other things directing that the policy of the Panama Rail Road Company be harmonized with the policy of the Government, as an adjunct to the construction of the Canal.

Exhibit 2: Communication of General Smithers, Chief Coordinator of the United States Government, under date of March 28, 1927, to United States Shipping Board, stating the Chief Coordinator's conclusion after hearing on proposal to have the Shipping Board act as agent for the Panama Canal and to withdraw Panama Rail Road Company's steamship service between the United States and the Canal Zone.

Exhibit 3: Letter of Hon. Dwight F. Davis, Secretary of War, to the President of the United States, dated April 27, 1928, recommending the disapproval of the proposal of the Chairman of the Shipping Board that the Panama Rail Road Com-

82 *Exhibit 8 to Return—Affidavit.*

pany's steamship service be discontinued. The affiant further says that pursuant to the said letter the President took no action in furtherance of the recommendation of the Shipping Board; and that the policy outlined by Secretary of War Davis has been maintained by his successors in office.

Exhibit 4: Ruling of the Commissioner of Internal Revenue, dated March 11, 1918, that the Panama Rail Road Company was not subject to the provisions of Section 500 of the War Revenue Act approved October 3, 1917, imposing a tax of three percentum (3%) upon the amount paid for trans-
83 portation by rail and water.

Exhibit 5: Article 70 of Treasury Department Regulations No. 49, holding that transportation services rendered to agencies of the United States, among which was specifically included the Panama Rail Road Company, were exempt from the tax imposed by Section 500 of the Revenue Act of 1918 (40 Stat. 314).

Exhibit 6: Ruling of the Commissioner of Internal Revenue, dated August 5, 1919, that the Panama Rail Road Company was not subject to the Capital Stock Tax imposed upon corporations by Section 1000 of the Revenue Act of 1918 (40
84 Stat. 1126).

Exhibit 7: Ruling of the Commissioner of Internal Revenue, dated September 20, 1926, in response to an inquiry as to the application of Section 217(e) of the Revenue Act of 1926 (44 Stat., Part 2, p. 31): to the effect that the Panama Rail Road Company, being an agency of the United States Government, was not required to pay federal income taxes.

6. The affiant further says that he has been connected with the Panama Rail Road Company, in the capacity of General Counsel, since the year 1906; that he is familiar with the reasons which have animated the principal officials of the Government in maintaining the operations of the Panama Rail Road Company and the Panama Steamship Company under the New York charter of 1928; and that these reasons are, first, the greater facilities in handling accounts, as otherwise all gross receipts of the Panama Rail Road Company would have to be covered in the treasury of the United States and the operating expenses specifically provided for by Act of Congress; secondly, under the original concession of the State of Colombia to the Panama Rail Road Company, the Panama Rail Road Company was in receipt of valuable concessions of land upon the Isthmus of Panama, the status of which it is deemed undesirable to disturb.

Affiant says that William R. Pfizer has been employed as Secretary of the Panama Rail Road Company, Victor M. Newton as Treasurer and Richard Reid Rogers as General Counsel, at fixed salaries, during the periods covered by the hearing and protest filed in this case, as shown in tax returns and records of the Commission.

RICHD. REID ROGERS.

Sworn to before me this
15th day of December, 1934.

ANDERSON WOODS,
Notary Public.

(Seal) Kings County No. 345.
Certificate filed in N. Y. County No. 403.
Commission expires March 30, 1935.

88 *Exhibit 8 to Return--Exhibit 1 to Affidavit.*

Exhibit 1 to Affidavit.

White House,
Washington, D. C., May 9, 1904.

Sir:

By the act of Congress approved June 28, 1902, the President of the United States is authorized to acquire for, and on behalf of, the United States, all the rights, privileges, franchises, concessions, grants of lands, rights of way, unfinished work, plants, shares of the capital stock of the Panama Railway, owned by or held for the use of the new
89 Panama Canal Company, and any other property, real, personal and mixed of any name or nature owned by the said new Panama Canal Company situated on the Isthmus of Panama. The President is by the same act also authorized to acquire for, and on behalf of, the United States perpetual control of a strip of land on the Isthmus of Panama, not less than six miles in width, extending from the Caribbean Sea to the Pacific Ocean, and the right to excavate, construct, and maintain perpetually, operate and protect thereon, a ship canal of certain specified capacity and also the right to perpetually operate the Panama Railroad. Having acquired such rights, franchises, property, and control, the President is by the same act required
90 to excavate, construct, and complete a ship canal from the Caribbean Sea to the Pacific Ocean, and to enable him to carry forward and complete this work, he is authorized to appoint, by and with the consent of the Senate, an Isthmian Canal Commission of seven members, who are to be in all matters subject to his direction and control.

By the terms of the Canal Convention between the United States and the Republic of Panama, entered into in pursuance of the said act of Congress approved June 28, 1902, the ratifications of which were exchanged on the 26th day of February, 1904, the Republic of Panama granted to the United States:

First, the perpetual use, occupation, and control of a certain zone of land, land under water including islands within said zone, at the Isthmus of Panama, all to be utilized in the construction, maintenance, and operation, sanitation and protection of the ship canal, of the width of ten miles 92
extending to the distance of five miles on each side of the central line of the route of the canal, and the use, occupation, and control of other lands and waters outside of the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation, and protection of said canal or of any auxiliary canals or other works necessary and convenient for the same purpose; also the islands of Perico, Naos, Culebra, and Flamenico situated in the Bay of Panama, and

Second, all the rights, powers, and authority within the zone, auxiliary lands and lands under water, which the United States would possess and exercise if it were the sovereign of the territory granted, to the entire exclusion of the exercise by 93
the Republic of Panama of any such sovereign rights, power, and authority.

By the act of Congress approved April 28, 1904, the President is authorized, upon acquisition of the property of the new Panama Canal Company, and the payment to the Republic of Panama of the price for compensation agreed upon in the said Canal Convention, to take possession of, and occupy

94 *Exhibit 8 to Return—Exhibit 1 to Affidavit.*

on behalf of the United States, the zone of land, and land under water, including islands within said zone at the Isthmus of Panama of the width of ten miles extending to the distance of five miles on each side of the central line of the route of the Canal to be constructed thereon, including the islands of Perico, Naos, Culebra, and Flamenico, and from time to time as may be necessary and convenient certain auxiliary lands and waters outside the said zone for the purpose of constructing, maintaining, operating, sanitating, and protecting the ship canal, the use, occupation, and control where-
95 of were granted to the United States by the Republic of Panama in the said Canal Convention.

By the same act, the President is authorized, for the purpose of providing temporarily for the maintenance of order in the Canal Zone and for maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion, to delegate to such person or persons as he may designate and to control the manner of their exercise, all the military, civil and judicial powers as well as the power to make all needful rules and regulations for the government of the Canal Zone and all the rights, powers and authority granted by the said Canal Convention to the United States, until the close of the Fifty-eighth Congress.
96 Payments of the authorized purchase price of $40,000,000 to the new Panama Canal Company for the property of that corporation on the Isthmus, including the shares of railway stock, and for the records in Paris, and of the sum of $10,000,000, as stipulated in the Canal Convention, to the Republic of Panama for the rights, powers, and privileges granted to the United States by the terms of the

said convention, have been made and proper instruments of transfer have been executed by the Panama Canal Company. The members of the Isthmian Canal Commission have been appointed. They have organized the commission and entered upon their duties. I have taken possession of and now occupy, on behalf of the United States, the canal zone and public land ceded by the Republic of Panama.

* * * * * * *

By virtue of the ownership by the United States of about sixty-nine seventieths of the shares of the capital stock of the Panama Railroad the general policy of the managers of said road will be con- 98
trolled by the United States. As soon as practicable I desire that all the members of the Isthmian Canal Commission be elected to the board of directors of the road, and that the policy of the road be completely harmonized with the policy of the Government of making it an adjunct to the construction of the canal, at the same time fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama. If any contracts or other obligations now subsist between the railway company and other transportation companies that are not in accord with sound public policy, then such contracts must be terminated as soon as it is possible to effect that 99
object.

* * * * * * *

Very respectfully,

THEODORE ROOSEVELT.

WILLIAM H. TAFT,
Secretary of War.

100 *Exhibit 8 to Return—Exhibit 2 to Affidavit.*

Exhibit 2 to Affidavit.

OFFICE OF THE CHIEF COORDINATOR
WASHINGTON

March 28, 1927.

Mr. T. V. O'Connor, Chairman,
U. S. Shipping Board,
Washington, D. C.

My dear Mr. O'Connor:

The hearings requested in your letter of January
101 21, 1927, have been held. At these hearings the Shipping Board's plan to act as agent for the Army, Navy and Panama Canal was discussed at length. Condensed minutes and accompanying documentary matter have already been furnished you.

The fact was quite convincingly established in conference that ships of the character under discussion are an integral part of the military, naval and Panama Canal establishments: indispensable to them in the discharge of their normal responsibilities: and in no way related to the merchant fleet of potential war-time transports. The very nature of their responsibilities is such that none of these establishments can afford to risk reliance upon ships over which they do not exercise the
102 power of command.

The immediate *purpose* behind the Shipping Board's plan is to establish the Merchant Fleet Corporation in the position of shipping agent specifically for the military, naval and Panama Canal establishments and by implication for any other establishment of Government that may have need of overseas transportation. Its distant *object* is to further augment the flow of Government traffic into commercial channels.

The project contemplates without any guarantee of fulfillment the continuance of a service equal to or better than that now provided by each establishment for itself. This is predicated upon the assumption that Shipping Board vessels and those of commercial lines are sufficiently adaptable to be capable of meeting with dependable speed and certainty the unexpected demands to which Army and Navy transports and Panama Canal vessels are now subject. The plan predicts greater economy through lowered costs of operation without giving any assurance that, once dependence upon commercial sources is established, a reactionary rise in costs will not follow. 104

Nowhere is recognition given to a recourse to the dispensing powers of the President of the United States as a safeguard against unreasonable demands on the one hand or inferior service on the other. It is generally recognized and accepted in principle that both servitor and beneficiary must be subordinated to the dispensing powers of superior authority.

No establishment of Government dependent upon shipping for the fulfillment of its mission in Government may with impunity be placed in a position of forced dependence upon shipping that is less sensitive to the pressure of its own dispensing authority than are the vessels operated in its own service; nor may it safely be forced into dependence upon vessels whose movements are less responsive to the orders or desires of its own dispensing authority than are vessels operated directly under its own command. 105

It is quite conceivable that, given these powers of control delegated by the Chief Executive over Shipping Board agents as servitors of the Federal Government, a unified shipping organization could

be made to render effective service. It is quite possible that it might even return revenue to the Government and so lower costs of operation and maintenance. The Navy considers that shipping of this character operated by it has reached the irreducible minimum and such freight and passenger-carrying vessels as remain to it are armed auxiliaries to the fleet. The Army and the Panama Canal strongly support the same contention.

The time has not yet arrived to seriously consider the organization of a federally operated shipping service and certainly such an undertaking should
107 not be seriously contemplated until such time as the American Merchant Marine shall comprise an organized establishment made up of a disciplined body of officers and seamen, destined in time of war to pass perhaps, together with the Merchant Fleet Corporation, under naval control. Certainly no step in this direction should be undertaken except in pursuance of a plan of gradual absorption service replace those of the present independent services as they pass out of commission due to unin which vessels manned and equipped by a unified seaworthiness or incapacity for other cause.

Under these convictions I cannot lend my support to the promulgation of the proposed order that accompanied your letter of January 21st. I shall,
108 however, have the subject of Government overseas traffic in its entirety brought under observation and study by the Federal Traffic Board with a view to discovering whether any proper means may be found to foster to a greater degree than is now being done the interests of the American Merchant Fleet.

Very sincerely yours,

H. C. SMITHER,
Chief Coordinator.

Exhibit 3 to Affidavit.

(Letter from the Secretary of War, Dwight F. Davis, to the President.)

April 27, 1928.

Dear Mr. President:

In reply to letters addressed to you under date of March twenty-third and twenty-eighth, by the Chairman of the United States Shipping Board, regarding the activities of the Panama Railroad Steamship Line, I am sending herewith the detailed comments of the Vice-President of the Panama Railroad Company, together with a letter from the Governor of the Panama Canal and a copy of a previous memorandum from him on the same subject, and a letter from the Secretary of State enclosing report from the High Commissioner in Haiti, protesting against the suggested discontinuance of the service to Haiti. I also enclose copy of a report of the Chief Coordinator, made after a thorough investigation and hearings on this general subject. I am returning the letters from the Chairman of the Shipping Board, having retained copies for my files.

It is difficult to sum up the voluminous discussion in the enclosures, but I will attempt to summarize briefly the main features.

The two main considerations which apparently caused the original letters from the Chairman of the Shipping Board are based upon misconceptions and can be dismissed with the statements of fact that:

a. The Panama Railroad Steamship Line does not contemplate any extension of its service, and

112 *Exhibit 8 to Return—Exhibit 3 to Affidavit.*

b. It is not operating chartered steamers, as the titles are merely vested in the Panama Canal and not in the Steamship Company, and

c. The estimates for the construction of a new steamer was not for the extension of the service, but merely as a replacement.

The other issues raised in the letters have been frequently brought up in various forms in recent years and have uniformly been decided against the Shipping Board contentions, either directly or by
113 inaction, by the President, two former Secretaries of War, three Committees of Congress, and recently, after full hearing, by the Chief Coordinator.

The steamers of the Panama Railroad Steamship Line, built in American shipyards, operated by an American Corporation the capital stock of which is owned by the American government, are themselves a part of the American Merchant Marine.

The Line is an integral part of the Panama Canal and indispensable in its discharge of its normal responsibilities. The successful operation of this great enterprise, which is of vital importance to the United States, demands absolute security as to its line of supply to this country. Discussing
114 the proposal to rely only on privately-owned ships, the Governor of the Canal Zone writes:

> "I cannot see anything but disaster for the Canal from such procedure."

It would be directly opposed to sound military defense procedure and to the economical and business operation of the Panama Canal.

Regarding the proposal that the service to Haiti be discontinued, it was stated that this service was started at the earnest solicitation of the State and Navy Departments and that two Secretaries of State, Secretary Hughes and Kellogg, our High Commissioner in Haiti, General Russell, and all the important firms engaged in commerce between the United States and Haiti, have protested vigorously against the present, and previous similar suggestions. Secretary of State Kellogg writes on April 12, 1928:

> "I feel that very unfortunate results might be expected to follow the cessation of the service." 116

The High Commissioner

> "strongly recommends that the Department protest against the discontinuation of this valuable service."

It is not believed that the discontinuance of this service would greatly benefit American shipping. When the Panama Railroad Steamship Line withdrew its service from all Haitian ports other than Port au Prince, for the sole purpose of helping an American Line, it was stated by the U. S. Consul at Haiti that within a short time the Royal Dutch 117
Line had captured eighty-five per cent of the business and the same result would follow the discontinuance of the present service. Therefore I believe that the withdrawal of this service would be a serious blow to American commerce in Haiti; that it would be opposed by American and Haitian shippers; that it would detrimentally affect American relations with Haiti and that the principal, if

not the sole beneficiary, would be a foreign steamship line. I therefore oppose strongly the discontinuance of this service.

The situation in the case of the West Coast Line is somewhat similar. The Grace Line is the only other American line operating in the West Coast service and it has recently announced that it will soon withdraw its American flag steamers. The owners of this line are primarily bankers, merchants, etc., and as such are regarded as competitors by the importers and exporters of Colombia and Ecuador. It is believed that these merchants
119 would refuse to ship on the line of their rival and that therefore the greater part of the commerce now carried on our steamers would be diverted to the Royal Mail Steam Packet Company under the British flag. The discontinuance of our line would probably be seriously objected to by exporters and importers interested, would injure American commerce and might have a prejudicial effect on our friendly relations with Colombia. As stated, the probable effect would be to benefit British, rather than American shipping.

These matters and others raised in the basic letters are treated at length in the paper prepared by the Panama Railroad Steamship Company officials. After a careful study of the various papers, including
120 the letters from the Secretary of State and the High Commissioner in Haiti, the findings of the Chief Coordinator and other documents, I recommend that the proposals of the Chairman of the Shipping Board be disapproved.

Very respectfully,

DWIGHT F. DAVIS,
Secretary of War.

Exhibit 4 to Affidavit.

March 11, 1918

Commissioner of Internal Revenue
Address reply to Commissioner
of Internal Revenue and refer
to ST-RCB

The Panama Canal,
Mr. A. L. Flint, Chief of Office,
Washington, D. C.

Sir:—

Receipt is acknowledged of your letter of February 15, 1918, relative to the application of the provisions of Section 500 of the Act of October 3, 1917, to transportation services performed for the Panama Rail Road Company. 122

In reply, you are advised that payments made from the treasury of the United States for transportation or other services are exempt from the tax, *and as payments for services rendered the Panama Railroad Company are in substance payments for services rendered the United States, under the provisions of section 502 of the Act they are exempt from the tax.*

Copies of T. D. 2551 and 2597, relative to exemption, are herewith enclosed for your information. 123

Respectfully,

B. C. KEITH,
Deputy Commissioner.

124 *Exhibit 8 to Return—Exhibit 5 to Affidavit.*

Exhibit 5 to Affidavit.

(Excerpt from Treasury Department Regulations No. 49.)

Article 70. Government agencies. Transportation services rendered to agencies of the United States are exempt from the tax. Such agencies include the American National Red Cross, United States Shipping Board Emergency Fleet Corporation, United States Food Administration Grain Corporation, United States Fuel Administration, United States Housing Corporation, Commission
125 on Training Camp Activities, War Savings Committee, Liberty Loan Committee, War Industries Board, Federal Farm Appraisers, Federal Land Banks, Federal reserve banks, *Panama Railroad Co.*, and similar agencies supported by Government funds.

(Copied from Corporation
Trust War Tax Service
1919.)

126

Exhibit 6 to Affidavit.

TREASURY DEPARTMENT

August 5, 1919.

Office of Commissioner
of Internal Revenue.

Panama Railroad Co.,
21 State Street,
New York, N. Y.

Gentlemen:

128 Reference is made to your capital stock tax return, Form 707, filed with the Collector October 30, 1918.

Kindly inform this office of any provisions in the corporation's charter or of any existing agreement involving the liability of your company for taxes.

In the absence of any such requirements it would appear that the Panama Rail Road Company is a Government agency and is not liable for capital stock tax. If this assumption is correct, you are at liberty to file claim for refund of $14,896.00 amount of tax paid, using the enclosed form, and stating full particulars.

Your reply is desired within 15 days. 129

Respectfully,

M. W. RUDDICK
Acting Deputy Commissioner.

130 *Exhibit 8 to Return—Exhibit 7 to Affidavit.*

Exhibit 7 to Affidavit.

TREASURY DEPARTMENT
WASHINGTON

September 20, 1926.

Office of Commissioner of
Internal Revenue

Panama Rail Road Company,
24 State Street,
New York, New York.

131 Attention: V. M. Newton,
Acting Third Vice-President.

Sirs:—

Reference is made to your letter dated February 24, 1926, relative to the application of Section 217(e) of the Revenue Act of 1926 to the net income derived from your coal and commissary operations in the Canal Zone.

It appears that you are a domestic corporation and that under the authority of Section 1 of the Isthmian Canal Act of June 28, 1902, the United States acquired your entire capital stock. It further appears that for the purpose of the tax imposed by Section 500 of the Revenue Act of 1917,
132 it was held that you were an agency of the United States Government.

Inasmuch as you are a governmental agency you are not required to file Federal income tax returns or to pay Federal income taxes.

Respectfully,

D. H. BLAIR,
Commissioner.

Exhibit 9 to Return.

Determination of State Tax Commission.

This is printed as Schedule A to Petition for Certiorari, beginning on page 6, and is therefore omitted here.

Stipulation Waiving Certification.

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing are true and correct copies of the petition for a writ of certiorari, the order granting the writ of certiorari, the writ of certiorari, the return to the writ of certiorari, and the exhibits and pertinent and material parts of exhibits annexed to said return, and the whole thereof, which are on file in the office of the Clerk of the County of Albany; and certification thereof is hereby waived.

Dated, June 22, 1935.

RICHARD REID ROGERS,
Relator in Person.

JOHN J. BENNETT, Jr.,
Attorney-General of the State
of New York,
Attorney for Respondents.

136 **Order of Appellate Division Appealed From.**

At a Term of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, held at the County Court House in the City of Albany, New York, commencing on the 17th day of September, 1935.

Present:

Hon. James P. Hill, *Presiding Justice*,
Hon. Leon H. Rhodes,
Hon. Daniel V. McNamee,
Hon. John C. Crapser,
Hon. Christopher J. Hefkernan.

137

The People of the State of New York *ex rel.* Richard Reid Rogers,

Relator,

against

Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York,

Respondents.

138

The relator, Richard Reid Rogers, in the above-entitled proceeding having heretofore and on the 26th day of April, 1935, obtained an order and writ of certiorari to review a final determination of the State Tax Commission, made on or about the 30th day of March, 1935, assessing additional income taxes against the relator for the calendar years

1927, 1928 and 1929, and return to said order and writ of certiorari having been duly made, and the issues raised having come on for hearing before this Court at the above named term thereof; and the cause having been argued and the relator having appeared in person, and the respondents having appeared by Hon. John J. Bennett, Jr., Attorney General of the State of New York, Joseph M. Mesnig, Assistant Attorney General, of counsel, their attorney, and due deliberation having been had thereon,

NOW, on motion of John J. Bennett, Jr., Attorney General of the State of New York, attorney for respondents, it is

ORDERED, that the said determination of the State Tax Commission, made on or about the 30th day of March, 1935, be, and the same hereby is, unanimously confirmed, with fifty dollars costs and disbursements.

JOHN S. HERRICK,
Clerk.

142 **Opinion of Appellate Division.**

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS,

Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as
143 Commissioners constituting the State Tax Commission of the State of New York,

Respondents.

Argued September Term, 1935.
Decided November Term, 1935.

Before:

HON. JAMES P. HILL,
Presiding Justice;

144 HON. LEON G. RHODES,
HON. DANIEL V. MCNAMEE,
HON. JOHN C. CRAPSER,
HON. CHRISTOPHER J. HEFFERNAN,
Associate Justices.

Review by certiorari from a determination of the State Tax Commission assessing additional income taxes against relator for the calendar years 1927, 1928 and 1929.

RICHARD REID ROGERS, relator, *pro se*, 74 Trinity Place, New York City, N. Y.

HON. JOHN J. BENNETT, JR., Attorney General (JOSEPH M. MESNIG, HENRY EPSTEIN, of counsel), attorney for respondents, The Capitol, Albany, N. Y.

OPINION FOR CONFIRMATION.

HEFFERNAN, *J.*:

Relator has invoked the writ of certiorari under the provisions of Sections 375 and 199 of the Tax Law to review a final determination of the State Tax Commission assessing additional income taxes against him for the calendar years 1927, 1928 and 1929.

During the years in question relator was employed by the Panama Rail Road Company as general counsel at an annual salary of $15,000.00. In filing his income tax returns for those years he acknowledged receipt of the income, but did not include it as part of his gross income for tax purposes. Assessments for the tax computed thereon were made by the Tax Commission.

The Panama Rail Road Company is a New York corporation created by Chapter 284 of the Laws of 1849. That act authorized certain named individuals to form a corporation known as Panama Rail Road Company, with a capital stock of not to exceed $5,000,000, for the purpose of constructing and operating a railroad across the Isthmus of Panama under a grant made to three named individuals by the then Republic of New Grenada. As

an incidental power it was authorized to own and operate steamships. Six years later by Chapter 364 of the Laws of 1855 it was granted certain additional powers and permitted to increase its capitalization to an amount not to exceed $7,000,000, its present capitalization.

So far as the record discloses it was apparently privately owned and operated for about fifty-five years, when its entire capital stock was acquired by the United States. The entire capital stock except directors' shares is still owned of record by the United States. The Company is managed
149 by a board of thirteen directors, each of whom holds one share of stock. The directors are elected by the Secretary of War in his capacity as stockholder of record of 69,987 shares. The capital stock consists of 70,000 shares of the par value of $100.00.

The Panama Rail Road Company conducts a general transportation business and has its principal office in the City of New York. At New York City it has about one hundred office employees, in addition to dock engineers, cargo checkers, freight clerks and passenger agents. It operates a line of steamships between New York and Canal Zone, carrying passengers and cargo. Its steamers have also operated to Haiti and South America. The
150 Company also operates a railroad across the Isthmus of Panama, a commissary establishment, a dairy and two hotels. The Company engages in commercial business and its tariffs correspond to those of competing private carriers. It carries government freight and government employees at reduced rates. The Company has been operating at a profit and has been paying dividends. Its employees are paid directly by the Company from

moneys derived from the Company's operations. No liability rests upon the United States because of any claim for damages which might lie against the Company. In competition with privately owned ocean carriers the corporation operates a fleet of steamships. It solicits and accepts commercial freight and passenger business, carrying government freight and passenger business at reduced rates.

Assuredly the railroad was originally conceived, constructed and operated as a private commercial, profit-making enterprise. That the commercial and proprietary character of the Company was to be continued after the United States acquired the stock is strikingly attested by the communication which President Theodore Roosevelt addressed to the then Secretary of War, dated May 9, 1904. Mr. Roosevelt expressed a desire "that the policy of the road be completely harmonized with the policy of the Government of making it an adjunct to the construction of the canal, at the same time fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama."

Relator's contention is that the Panama Rail Road Company is an instrumentality of the United States; that as such the Company is exempt from State taxation; and that, the Company being so exempt, the salaries of its officers and employees are likewise exempt.

The learned counsel for respondents asserts that the real point in issue is not only whether the Panama Rail Road Company is an instrumentality of the United States, but whether the Company is engaged in the conduct of either an essential or useful governmental function.

Section 359-f of the Tax Law provides for an exemption from the application of the New York Personal Income Tax (Art. 16, Tax Law) in the case of salaries, wages and other compensation paid by the United States to its officers and employees. Relator, contending for the income tax exemption of his salary, has not invoked this statutory exemption, but rests his claim upon the fundamental, constitutional doctrine that the governmental instrumentalities and agencies of the Federal Government and the various State governments are mutually immune from taxation by the other. The
155 doctrine is thoroughly imbedded in our jurisprudence that a State is without power to tax the property or the agencies or instrumentalities of the United States. Similarly, the Federal Government lacks power to tax State property or agencies (*Van Brocklin* v. *Tennessee*, 117 U. S. 151; *McCulloch* v. *Maryland*, 4 Wheat. 436; *Collector* v. *Day*, 11 Wall. 113).

Immunity from taxation extends only to agencies and instrumentalities engaged in usual governmental functions (*Railroad Company* v. *Peniston*, 18 Wall. 5; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123).

In *South Carolina* v. *United States* (199 U. S. 437) it was held that the exemption of State agen-
156 cies and instrumentalities from Federal taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business. Thus, Mr. Justice Brewer, speaking for the court, said:

> "Now, if it be well established, as these authorities say, that there is a clear distinc-

tion as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation."

A question very similar to that presented in *South Carolina* v. *United States, supra*, was decided by the United States Supreme Court in *Ohio* v. *Helvering* (292 U. S. 360). The court reiterated the principle that whenever a State engages in a business of a private nature, it exercises non-governmental functions and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress. In that case it was said:

"If a State chooses to go into the business of buying and selling commodities its right to do so may be conceded * * * but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a State enters the market place seeking customers it divests itself of its quasi sovereignty *pro tanto*, and takes on the character of a trader, so far at least as the taxing power of the federal government is concerned."

In *Flint* v. *Stone Tracy* (220 U. S. 108) Mr. Justice Day, speaking for the court, said:

> "It is no part of the essential governmental functions of a State to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations and though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies whose business is prosecuted for private emolument and advantage. For the purpose of taxation they
> 161 stand upon the same footing as other private corporations upon which special franchises have been conferred."

The ever-widening activities of government made it inevitable that the question should again be presented to the Supreme Court of the United States and in 1934 (*Helvering* v. *Powers,* 293 U. S. 214) there was presented the question whether the compensation of the members of the board of trustees of the Boston Elevated Railway Company was constitutionally exempt from the imposition of the Federal income tax, immunity being claimed upon the ground that the trustees were officers of the Commonwealth of Massachusetts and instrumen-
162 talities of its government. It appeared that the railway company encountered financial difficulties and, by act of the Massachusetts Legislature, agreed to by the company, was taken over by the State to be publicly operated and managed for a limited period of time. It was not disputed that the trustees who were to manage the company were officers of the State and that their salaries were fixed by the Legislature, though they were to be paid from

the operations of the company. The Supreme Court of Massachusetts had previously been called upon to interpret the act in question and had characterized the operation of the railway by the State as being "undertaken by the Commonwealth, not as a source of profit, but solely for the general welfare." The Supreme Court held that the salaries of the trustees were not constitutionally immune from the imposition of the Federal income tax.

There followed the decision of the Circuit Court of Appeals, Second Circuit, in *Commissioner* v. *Modjeski* (75 Fed. [2nd] 468). In this case Dr. Modjeski, an eminent consulting engineer in the employ of the Delaware River Joint Commission in connection with the construction of a bridge over the Delaware River, sought exemption of his salary from Federal income taxation. The court, while discussing the question of "essential governmental functions" and "usual governmental functions," based its holding on a finding that Dr. Modjeski was an independent contractor and, for that reason, subject to taxation. The court said:

> "Whether the commission was a governmental agency engaged in the exercise of a usual governmental function or merely carrying on the ministerial or proprietary functions for inhabitants of the interested states, we need not decide."

The question whether the creation of port facilities, the building of bridges, highways and tunnels were essential or usual governmental functions, which was avoided in the *Modjeski* case, *supra*, was squarely presented and decided by the same court in *Commissioner* v. *Ten Eyck* (76 Fed. [2nd] 515),

a case involving the Federal taxation of the salary of the chairman of the Albany Port District Commission. The court reviewed in detail the creation, the powers and the activities of the Commission. It found that the construction of port and harbor or terminal developments and facilities were, classically and historically, governmental functions, usually conducted by governmental agencies. The court said:

> "The Commission, in the instant case, a public corporation, maintaining and operating a public port, not for profit, is performing a usual governmental function, and is not
167 withdrawing sources of revenue from the Federal taxing power. It has supplanted no private business to which the Federal taxing power would normally extend. If a private corporation performs public services for a profit, it cannot be said to be exercising governmental functions simply because of that service."

The court reviewed the Supreme Court decisions in the State liquor dispensary cases, *Ohio* v. *Helvering, supra,* and *South Carolina* v. *United States, supra,* and said:

> "It is the entrance into a trade enterprise that distinguishes these cases, relied upon
168 by the petitioner (Commissioner of Internal Revenue). It cannot be maintained that there is involved in the instant case a trade or business, entered into for profit, constituting a proprietary enterprise. Revenues are not profits, but revenues, like tolls collected from users of a State improvement, are merely means by which the State attempts to recoup in some part its legitimate expenses."

The Court affirmed the ruling of the United States Board of Tax Appeals that the salary of the Chairman of the Albany Port District Commission was not subject to Federal taxation.

The operation of steamships, railroads, stores, hotels or dairies has not the slightest relationship to any governmental function. Common sense compels the conclusion that such activities are intrinsically, traditionally and historically of a commercial and proprietary nature. And this is further reinforced when it is considered that the particular activities here in question have a background of fifty-five years of private, commercial operation. 170
As Mr. Justice Day said in *Flint* v. *Stone Tracy, supra,* it is no part of the essential governmental functions of a State to provide means of transportation.

It seems clear to us that the Panama Rail Road Company is a government-controlled corporate agency engaged in a commercial proprietary function. This case must be decided upon the principles laid down in *South Carolina* v. *United States, supra, Ohio* v. *Helvering, supra,* and *Helvering* v. *Powers, supra.* Assuredly, the ownership and operations of stores, hotels and dairies is akin to the operation of liquor stores; and the operation of a steamship line and a railroad comparable to 171
the operation of a street railway. And this particularly where such operation is in continuation and expansion of earlier private, commercial operation. The commercial nature of the functions of the Panama Rail Road Company are further marked by the fact that its operations are profitable and yield dividends to its stockholder, the United States. These operations constitute an activity

to which, unquestionably, the taxing power of the State would normally extend. Under the decision in *Helvering* v. *Powers, supra,* the Federal Government cannot withdraw sources of revenues from a State by engaging in a business which constitutes a departure from usual governmental functions and to which the State's taxing power would normally extend.

The mutual and complementary immunity from taxation of State and Federal instrumentalities of government is implicit in our constitutional form of government and is founded in the doctrine that
173 power to tax is power to destroy (*McCulloch* v. *Maryland, supra*).

It seems apparent that the principle of immunity, interfering as it does with the exercise of a vitally important, plenary sovereign power, ought only to be invoked and employed when there is a direct and imminent hindrance to, or restraint upon, functions which are unquestionably properly and usually governmental in their character. Otherwise, little will remain beyond an ever-dwindling semblance of State sovereignty, if immunity from State taxation is sought and allowed in the case of all of the constantly broadening activities of the Federal Government.

174 The determination of the State Tax Commission should be confirmed with $50.00 costs.

Notice of Appeal to the Court of Appeals.

SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS,

Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Respondents.

PLEASE TAKE NOTICE that Richard Reid Rogers, the relator in the above-entitled proceeding, hereby appeals from the order of the Appellate Division of the Supreme Court for the Third Judicial Department entered on the 18th day of November, 1935, confirming the final determination of the State Tax Commission made on or about the 30th day of March, 1935, assessing additional income taxes against the relator for the calendar years 1927, 1928 and 1929; and awarding costs and disbursements to the respondents against the relator. And this appeal is taken from each and every part of said order as well as from the whole thereof.

Dated, New York, N. Y., December 27, 1935.

RICHARD REID ROGERS,
Relator, *pro se*,
Office & P. O. Address,
74 Trinity Place,
Borough of Manhattan,
New York, N. Y.

178 *Notice of Appeal to the Court of Appeals.*

To:

THE CLERK OF THE APPELLATE
DIVISION OF THE SUPREME COURT,
THIRD JUDICIAL DEPARTMENT,
Albany, New York.

THE ATTORNEY-GENERAL OF THE
STATE OF NEW YORK,
Attorney for Respondents,
Albany, New York.

Stipulation Waiving Certification.

179 Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the record on appeal to the Appellate Division of the Supreme Court for the Third Department, the order of the Appellate Division confirming the determination of the State Tax Commission, the opinion of the Appellate Division on said appeal, and the relator's notice of appeal to the Court of Appeals from said order; and certification thereof is hereby waived.

Dated, New York, March 16, 1936.

180 RICHARD REID ROGERS,
Relator *pro se*,

JOHN J. BENNETT, JR.,
Attorney-General of the State
of New York,
Attorney for Respondents.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 61] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, SS:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 28th day of April in the year of our Lord one thousand nine hundred and thirty-six, before the Judges of said Court.

Witness the Hon. Frederick E. Crane, Chief Judge, Presiding. John Ludden, Clerk.

REMITTITUR—April 29, 1936

[fol. 62] THE PEOPLE, ETC., ex Rel. RICHARD REID ROGERS, Appellant,

ag'st

MARK GRAVES & ors., as Commissioners Constituting the State Tax Commission of the State of New York, Respondents

Be it Remembered, That on the 18th day of March, in the year of our Lord one thousand nine hundred and thirty-six, Richard Reid Rogers, the appellant in this cause, came here into the Court of Appeals, by Richard Reid Rogers, pro se, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Mark Graves and others, as Commissioners constituting the State Tax Commission of the State of New York, the respondents in said cause, afterwards appeared in said Court of Appeals by John J. Bennett, Jr., Attorney General,

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Richard Reid Rogers, of counsel for the appellant; and by Mr. Joseph M. Mesnig, of counsel for the respondents; and after due deliberation had there-

on, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is affirmed with costs.

[fol. 63] And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said order be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS

Clerk's Office,

Albany, April 29, 1936.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

Clerk's certificate to foregoing paper omitted in printing.

[fol. 63½] SIR:

Take notice that the within is a copy of Remittitur duly filed and entered in the office of the Clerk of Albany County, on the 2nd day of May, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address: Capitol, Albany, N. Y.

To Richard Reid Rogers, Esq., Attorney for Appellant, 521 Fifth Ave., New York, N. Y.

[fol. 64] IN COURT OF APPEALS OF NEW YORK

CLERK'S CERTIFICATE OF NO OPINION BY COURT OF APPEALS

I, John Ludden, Clerk of the Court of Appeals of the State of New York, Do Hereby Certify that no opinion was handed down by said Court of Appeals of the State of New York in affirming the order appealed from in the case of The People &c., ex rel. Richard Reid Rogers, Appellants, against Mark Graves and others, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Albany in the State of New York this twelfth day of June A. D. 1936.

John Ludden, Clerk. (Seal State of New York, Court of Appeals.)

Clerk's certificate to foregoing paper omitted in printing.

[fol. 65] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

Present: Hon. Gilbert V. Schenck, Justice Presiding.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of RICHARD REID ROGERS, Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents

ORDER ON REMITTITUR—May 2, 1936

The relator above named having appealed to the Court of Appeals from a final order of the Appellate Division of the Supreme Court, Third Judicial Department, in the above entitled proceeding, which order unanimously confirmed a final determination of the respondents as Commissioners constituting the State Tax Commission of the State of New York, made on or about the thirtieth day of March, 1935, assessing additional income taxes against the

relator for the calendar years 1927, 1928 and 1929, and which said final order was duly entered in the office of the Clerk of the Appellate Division, Third Department, and the appeal having been duly argued at the Court of Appeals, and after due deliberation had thereon, the Court of Appeals having made its decision, and having ordered [fol. 66] and adjudged that the order of the Appellate Division of the Supreme Court so appealed from be affirmed, with costs, and having further ordered that the proceedings and record herein be remitted to the Supreme Court, there to be proceeded upon according to law,

Now, on reading the remittitur from the Court of Appeals herein, and upon motion of John J. Bennett, Jr., Attorney-General of the State of New York, Attorney for the above named respondents, it is

Ordered, that the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and it is further

Ordered, that the respondents have judgment against Richard Reid Rogers, the relator herein, for their costs and disbursements in the Court of Appeals, to be taxed.

Gilbert V. Schenck, Justice of the Supreme Court.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 66½] SIR:

Take notice that the within is a copy of Order duly filed and entered in the office of the Clerk of Albany County, on the 2nd day of May, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address: Capitol, Albany, N. Y.

To Richard Reid Rogers, Esq., Attorney for Relator, 521 Fifth Avenue, New York, N. Y.

[fol. 67] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

PETITION FOR APPEAL

To the Honorable Judges of the Court of Appeals of the State of New York:

1. The petitioner is the appellant in the above-entitled cause.

2. On the 18th day of November, 1935, the Appellate Division of the Supreme Court of the State of New York for the Third Department confirmed the final determination of the State Tax Commission made herein on or about the 30th day of March, 1935, whereby there were subjected to taxation by the State of New York the annual salaries of officers of the Panama Rail Road Company, including the annual salary of this relator as General Counsel for the years 1927, 1928 and 1929. From this order an appeal was taken to this Court, the court of last resort in this State, which, on the 28th day of April, 1936, affirmed the order and decision of the Appellate Division. Thereafter, upon the remittitur of this Court, and on the 2nd day of May, 1936, a final judgment against appellant was entered in the Supreme Court of the State of New York, in the County of Albany.

3. There was error in the final judgment and proceedings in this Court, and in the final judgment entered in the New York Supreme Court on the remittitur of this Court, as [fol. 68] more particularly appears from the assignment of errors submitted herewith, whereby the petitioner is aggrieved; in that, in the decision and order of the Appellate Division, as affirmed by this Court, there is drawn in question the validity of a statute of the State of New York, to-wit, Article 16 of the Tax Law of New York, being Chapter 627 of the Laws of 1919, section 1, as amended, and particularly section 351 in said article, in so far as said statute authorized the annual salaries paid the petitioner by the Panama Rail Road Company, an instrumentality of the Government of the United States, to be taxed by the State of New York, upon the ground that the said statute is repug-

nant to and in contravention of the Constitution of the United States, and in particular of Article 1, section 8, thereof, and the decision and judgment aforesaid is in favor of the validity of the said statute.

Wherefore, the petitioner prays for the allowance of an appeal from the aforesaid final judgment of the Court of Appeals of the State of New York and of the Supreme Court of the State of New York entered on remittitur of the Court of Appeals, against the petitioner, to the Supreme Court of the United States; in order that the decision and judgment of the Court of Appeals and of the Supreme Court of the State of New York may be examined and reversed; and further prays that a transcript of the record, papers and proceedings in the cause, duly authenticated by the Clerk of the Supreme Court of New York in the County of Albany, may be sent to the Supreme Court of the United States, as provided by law.

Dated at New York, N. Y., June 2, 1936.

Richard Reid Rogers, Petitioner, pro se.

Due and timely service admitted, this June —, 1936.

——— ———, Attorney-General of New York, by ———
———, Atty. for Respondents-Appellees.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 69] In Court of Appeals of New York

[Title omitted]

Order Allowing Appeal

On this 3rd day of June, 1936, on reading the petition of Richard Reid Rogers, the above-named relator and appellant, praying for the issuance of an order allowing an appeal in his behalf to the Supreme Court of the United States from the decision of this Court, the court of last resort in this State, affirming the order and decision of the Appellate Division for the Third Department, and from the final judgment entered herein in the Supreme Court of the State of New York on the remittitur of this Court; and

on reading the assignment of errors and the statement as to jurisdiction submitted by the appellant with said petition; and it appearing therefrom, and from the record in the above cause, that there is drawn in question the validity of a statute of this State, to-wit, Article 16 of the Tax Law of the State of New York, being Chapter 627 of the Laws of 1919, section 1, as amended, and particularly section 351 in said article, upon the ground that in so far as said statute authorized the taxation of an instrumentality of the Government of the United States and the annual salaries paid by such instrumentality to this appellant and other officers of the said instrumentality the same was repugnant to the Constitution of the United States and particularly to Article 1, section 8 thereof; and it further appearing that the de-[fol. 70] cision of this Court and the final order and judgment of the Supreme Court of this State entered upon the remittitur of this Court are in favor of the validity of said statute, and that the petition herein is proper for the issuance of this order; and it appearing from the underwritten consent signed by the attorney for the respondents that the taxes which are the subject of this proceeding have been paid by the relator-appellant to the State Tax Commission under protest, and that the costs of this appeal are secured by a bond in the sum of $500 heretofore filed with the said Commission, the attorney for the respondents waiving further security;

Now, therefore, it is

Ordered by the undersigned, the Chief Judge of the Court of Appeals of the State of New York, that the said appeal be and the same hereby is granted; and it is

Further Ordered, that no further security shall be required as a condition of allowing this appeal; and it is

Further Ordered, that the Clerk of the Supreme Court of the State of New York, in the County of Albany, within thirty days from the date hereof, make and transmit to the Clerk of the Supreme Court of the United States, under his hand and the seal of said court, a transcript of the record, containing a true copy of all the material parts of the record herein which shall be designated and filed with him by any of the parties hereto.

(Sgd.) Frederick E. Crane, Chief Judge of Court of Appeals.

The relator having heretofore paid (under protest) to the State Tax Commission the taxes which are the subject of this proceeding, and having heretofore filed a bond in the sum of $500 with said Commission covering all costs including the costs of this appeal, the respondents waive the filing of additional security on this appeal.

June 3, 1936.

(Sgd.) John J. Bennett, Jr., Attorney-General of New York, By Joseph M. Mesnig, Assistant Attorney-General.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 70½] Due and timely service admitted, this June —, 1936.

—— ——, Attorney-General of New York, by —— ——, Atty. for Respondents-Appellees.

[fol. 71] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in affirming the order and judgment of the Appellate Division of the Supreme Court holding that the New York State income tax law, in so far as it authorized the taxation of the annual salary paid by the Panama Rail Road Company to the appellant, was valid—the Constitution of the United States and particularly Article 1, section 8, thereof, to the contrary notwithstanding.

2. The said Court erred in failing to render judgment in favor of the appellant.

3. The said Court erred in holding that the Panama Rail Road Company, even though an instrumentality of the United States Government, had forfeited its immunity from State taxation because it engaged in certain commercial activities; and that the salaries paid its essential officers, including the annual salaries paid the appellant for the years 1927, 1928 and 1929, were therefore subject to State income taxation.

4. The said Court erred in not holding that such commercial activities, even if conducted at a profit, were only incidental to the main purpose of the Panama Rail Road Company as an adjunct of the United States Government [fol. 72] in carrying on the work of construction, maintenance and protection of the Panama Canal, which main purpose was within and not a departure from the usual governmental functions of the United States.

Dated at New York, N. Y., June 2, 1936.

Richard Reid Rogers, Relator-Appellant, pro se.

Due and timely service admitted this June —, 1936.

—— ——, Attorney-General of New York, by ——
——, Attorney for Respondents-Appellees.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 73] Citation, in usual form, showing service on John J. Bennett, Jr., omitted in printing.

[fol. 74] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL

SIRS:

Please Take Notice that the undersigned relator-appellant herein designates the following papers as material and necessary parts of the certified transcript of record herein on appeal to the Supreme Court of the United States:

1. Record on appeal to the Court of Appeals.
2. Remittitur of Court of Appeals to Supreme Court of State of New York.
3. Clerk's statement showing no opinion rendered by Court of Appeals.
4. Order of Supreme Court of State of New York on remittitur of Court of Appeals.
5. Petition for allowance of appeal to United States Supreme Court.

6. Order allowing appeal to United States Supreme Court.

7. Assignment of errors on appeal to United States Supreme Court.

8. Statement as to jurisdiction on appeal to United States Supreme Court.

[fol. 75] 9. Statement directing attention to paragraph 3 of Rule 12 of the United States Supreme Court.

10. Citation on appeal to United States Supreme Court, with proof of service.

11. Appellant's præcipe for record on such appeal, with proof of service.

Richard Reid Rogers, Relator-Appellant, pro se.

To Hon. John J. Bennett, Jr., Attorney-General of New York, Attorney for Respondents-Appellees, Albany, N. Y. The Clerk of the Supreme Court of the State of New York, Albany County, Albany, N. Y.

Due and timely service of the foregoing præcipe is hereby acknowledged, this 11 day of June, 1936.

John J. Bennett, Jr., Attorney-General of New York, by John H. Mensig, Attorney for Respondents-Appellees.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 76] UNITED STATES SUPREME COURT

STATEMENT UNDER RULE 13, PARAGRAPH 9—Filed June 26, 1936

1. For a statement of the points on which he intends to rely on this appeal, the appellant respectfully refers to the assignment of errors heretofore filed by him on this appeal, and asks that said assignment of errors be treated as such statement of points.

2. The appellant further states that he thinks the entire record necessary for the consideration of the said appeal.

Dated at New York, N. Y., June 23, 1936.

Richard Reid Rogers, Appellant, pro se.

Due and timely service of the foregoing statement is hereby admitted, this 24th day of June, 1936.

John J. Bennett, Jr., Attorney-General. Joseph M. Mesnig, Counsel for Appellees.

[fol. 77] [File endorsement omitted.]

Endorsed on cover: File No. 40,679. New York Supreme Court. Term No. 139. The People of the State of New York upon the relation of Richard Reid Rogers, appellant, vs. Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York. Filed June 26, 1936. Term No. 139, O. T., 1936.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 138

THE PEOPLE OF THE STATE OF NEW YORK, ex rel. THE EDISON & KINGLAND ELEC. RAILWAY COMPANY,

Plaintiff in Error,

vs.

MARK GRAVES, JOHN J. MERRILL and JOHN E. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York,

Defendants in Error.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

Brooklyn Law Review

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COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of RICHARD REID ROGERS,

Relator-Appellant,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York,

Respondents.

STATEMENT AS TO JURISDICTION.

1. Pursuant to paragraph 1 of Rule 12 of the Supreme Court of the United States, the relator files with his petition for appeal this statement showing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction of such appeal.

Subdivision (a) of Section 237 of the Judicial Code of the United States, as amended (Code of Laws, 1934 Ed., Title 28, section 344-a), provides as follows:

> "237 (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision

is in favor of its validity, may be reviewed by the Supreme Court upon appeal. The appeal shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the appeal."

2. The statute of the State of New York the constitutionality of which is involved herein is Article 16 of the Tax Law of said State, being Chapter 627 of the Laws of 1919, Section 1, as amended, particularly Section 351 of said Tax Law, which reads as follows:

"351. Imposition of income tax. A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business trade, profession or occupation carried on in this state by natural persons not residents of the state. Such tax shall first be levied, collected and paid in the year nineteen hundred and twenty upon and with respect to the taxable income for the calendar year nineteen hundred and nineteen, or for any taxable year ending during the year nineteen hundred and nineteen."

3. The judgment sought to be reviewed is the final judgment which was entered on the 2nd day of May, 1936, in

the Supreme Court of the State of New York, in the County of Albany, upon the remittitur of this Court, sent down pursuant to the decision of this Court made on the 28th day of April, 1936, affirming the order and decision of the Appellate Division for the Third Department.

4. The constitutional point is predicated upon the fact that the annual salaries paid the appellant by the Panama Rail Road Company for the years 1927, 1928 and 1929 were salaries paid to an essential officer of an instrumentality of the Government of the United States, to-wit, the Panama Rail Road Company, and therefore, under the Constitution of the United States and particularly Article 1, Section 8, thereof, not subject to State taxation.

This point was considered by the Appellate Division for the Third Department, and was indeed the only point decided by it, as appears from the following extract from the opinion of that court (R. 154):

> "Section 359-f of the Tax Law provides for an exemption from the application of the New York Personal Income Tax (Art. 16, Tax Law) in the case of salaries, wages and other compensation paid by the United States to its officers and employees. Relator, contending for the income tax exemption of his salary, has not invoked this statutory exemption, but rests his claim upon the fundamental, constitutional doctrine that the governmental instrumentalities and agencies of the Federal Government and the various State governments are mutually immune from taxation by the other. The doctrine is thoroughly imbedded in our jurisprudence that a State is without power to tax the property or the agencies or instrumentalities of the United States. Similarly, the Federal Government lacks power to tax State property or agencies." (*Van Brocklin* v. *Tennessee*, 117 U. S. 151; *McCulloch* v. *Maryland*, 4 Wheat. 436; *Collector* v. *Day*, 11 Wall. 113).

The decision of that court and of this Court on appeal, the court of last resort in the State, was in favor of the validity of the taxing power of the State of New York as taxing the appellant's salary, although it was urged upon both courts that the statute, as above set forth, if so applied was contrary to the Constitution of the United States; as is more particularly set forth in the assignment of errors annexed hereto.

The case is therefore one in which a review by the Supreme Court of the United States may be had as of right.

5. Special reference in this connection is made to the following decisions of the Supreme Court:

Bryant v. *Zimmerman,* 278 U. S. 63, 67, where it was said:

> "There are various ways in which the validity of a State statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the State court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

Bell's Gap R. R. Co. v. *Penn.,* 134 U. S. 232, 235;
Bridge Proprietors v. *The Hoboken Co.,* 1 Wall. 116, 142;
Ward v. *Love County,* 253 U. S. 17;
Carpenter v. *Shaw,* 280 U. S. 363, 369.

6. In the present case the appellant paid his State income tax for the years in question, under protest; and the last two cases cited support the view that the failure of the State courts to order its refund, assuming it to be

untaxable, is in itself a denial of due process under the Fourteenth Amendment.

7. While the appellant has no doubt of the direct appealability of the decisions of the State court above referred to, to the Supreme Court; it is the present law that the statement as to jurisdiction may be treated by the Supreme Court, if necessary, as a petition for a writ of certiorari. In that view, the appellant begs leave to submit the following additional considerations:

The following propositions were advanced by the appellant in the Appellate Division for the Third Department: (1) that the Panama Rail Road Company was a wholly owned instrumentality of the Government of the United States; (2) that as such it was exempt from State taxation; and (3) the instrumentality being so exempt, the fixed salaries paid to its officers and employees were likewise exempt from State taxation. The general principles thus asserted were uncontested by the Appellate Division, as appears from an examination of the opinion; and were admitted by the Attorney-General upon the argument in this Court. It was, however, insisted that the Panama Rail Road Company, even though an instrumentality of the Federal Government, was engaged in undertakings of a private commercial character, viz., the operation of a railroad and a steamship line, and the conduct of a commissary department on the Isthmus, from which it derived a profit; that this was a departure from ordinary governmental functions; and that the company therefore could not claim that immunity from State taxation applicable to Federal instrumentalities engaged in normal governmental activities which might otherwise exist. From this premise it followed as a logical conclusion that the Panama Rail Road Company having itself no exemption the salaries paid to its officers and employees could not be exempt.

The long line of acts of Congress and executive orders having the force of law set forth in the record, and the well-known history of the Panama Canal, and the part played by the Panama Rail Road Company as an adjunct in its construction, operation, maintenance and protection, as well as the characterization of that company by the Supreme Court of the United States as "an instrumentality of the United States Government in connection with the Canal" (*United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. 1, 6); put beyond doubt the fact that the Panama Rail Road Company is indeed an instrumentality of the national government. This was frankly admitted by the Attorney-General in the argument before this Court. That being so, have the several State courts been well grounded, in holding that by reason of the company's participation in certain commercial activities at a profit the immunity which would otherwise exist has been lost?

It is respectfully submitted that this conclusion is contrary to the decisions in the United States courts, including the Supreme Court itself.

The Panama Rail Road Company was bought, at the same time as the unfinished Panama Canal, from the old French Canal Company for a lump sum of $40,000,000, pursuant to the Act of Congress of June 28, 1902 (32 U. S. Stat. 481). The policy of making it "an *adjunct* to the construction of the Canal, at the same time fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama," was immediately declared by President Roosevelt, to whom Congress entrusted the execution of its mandate (fol. 97). Mr. Taft, Secretary of War, in whose department the Canal operations lay, declared that "the purpose of using the railroad to assist in the construction of the Canal will be largely defeated unless the representatives of the United States

may use the railroad without let or hindrance" (letter transmitting first report of Isthmian Canal Commission, Dec. 1, 1904—referred to by the Supreme Court in *U. S.* v. *McCarl, supra*).

With this preliminary statement, reference will now be made to the so-called commercial or non-governmental activities which are held to denude the Panama Rail Road Company of its immunity from State taxation. They are the operation of the railroad itself, the operation of its steamship line, and the operation of its commissary department.

As to the railroad, it was quite impossible for the Government, without disregarding contractual rights, to discontinue its operation. The concessionary contract of 1867 with Colombia, subsequently effective with respect to the Republic of Panama, provided for the perfection of the work of the railroad, "in order that it may better answer the necessities of the commerce of the world." Both President Roosevelt in his original order (*supra*) and Mr. Taft in his first report recognized this duty. The latter said:

> "Of course, under the franchise authorizing the operation of the railroad there is an obligation upon those who run the railroad and use the franchise to perform the duty of a common carrier" (doc. cited above).

As to the steamship line, as the Secretary of War, Mr. Davis, declared (fol. 113):

> "The line is an integral part of the Panama Canal and indispensable in its discharge of its normal responsibilities. The successful operation of this great enterprise, which is of vital importance to the United States, demands absolute security as to its line of supply to this country."

As to the commissary department, it was merely an instrument employed by the United States to avail of the

privileges conferred by Article XIII of the Treaty of November 18, 1903, between the United States and Panama, which provided that the United States should have the right to import into the Canal Zone all "articles necessary and convenient in the construction, maintenance, operation, sanitation and protection of the Canal and auxiliary works, and all provisions, medicines, clothing, supplies, and other things necessary and convenient for the officers, employees, workmen and laborers in the service and employ of the United States and for their families."

Considering the necessity or the advisability of continuing the commercial activities thus outlined—as to which necessity or advisability the Government of the United States must be the judge—the question arises whether these commercial purposes, as they are characterized by the Appellate Division, are not merely *incidental* to a main governmental purpose, to-wit, the construction, operation, maintenance and protection of the Canal; and whether by their exercise the immunity drawn from the main governmental purpose has been lost. On this point the appellant submits that the decision in the State courts is contrary to the decisions of the courts of the United States, as follows:

M'Culloch v. *Maryland*, 4 Wheat. 316;

Osborn v. *United States Bank*, 9 Wheat. 738, 859;

Baltimore National Bank v. *State Tax Commission of Maryland*, 297 U. S. 209;

United States v. *Coghlan*, 261 Fed. Rep. 425, 426;

Kings County v. *U. S. Emergency Fleet Corporation*, 282 Fed. Rep. 950;

(The last two cases cited with approval by the Supreme Court in *Clallam County* v. *United States*, 263 U. S. 341, 345);

Commr. of Internal Revenue v. *Ten Eyck*, 76 F. (2d) 515.

In *Osborn* v. *United States Bank,* the contention was raised that the Bank of the United States was an individual concern founded upon contract between individuals, "having private trade and private profit for its great end and principal object." The decision in *M'Culloch* v. *Maryland* was nevertheless adhered to, it being held that the fundamental governmental purpose of the bank overrode the commercial consideration.

In *Baltimore National Bank* v. *Tax Commission of Maryland* it was recognized that bank stocks held by the Reconstruction Finance Corporation could be taxed *only* by virtue of the consent of Congress; which has not been given with respect to the Panama Rail Road Company.

In *United States* v. *Coghlan* and *Kings County* v. *United States Emergency Fleet Corporation*—approved by the Supreme Court in *Clallam County* v. *United States*—it was held that the property of the Fleet Corporation, likewise a corporation in which the United States was the sole stockholder, could not be taxed by the States; although it is well known that the Fleet Corporation was operating a large fleet of ocean steamers on commercial routes, charging freights and competing with other ocean carriers.

In *Commissioner* v. *Ten Eyck,* it was held by the United States Circuit Court of Appeals that salaries paid by a New York corporation engaged in the improvement of the Hudson River navigation was not subject to Federal income taxation, even though the corporation exercised certain commercial activities. C/f *Dobbins* v. *Commissioner of Erie County,* 16 Pet. 435, 448.

8. There arises at this point another thought which involves a question of public interest. The United States, being exclusively a government of delegated powers, has no authority under the Constitution to engage in any form of private business. As said by Justice Gray, delivering

the opinion of the Supreme Court in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 155, 158.

> "The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All property must be held, just as taxes are levied, to pay the debts and provide for the common defense and general welfare of the United States."

The United States, under the Constitution, therefore, stands in an entirely different posture from the States or their municipalities, which possess two powers, one governmental and public (*e. g.*, the maintenance of streets and roads) and the other private (*e. g.*, the operation of a transportation system). See *Lloyd* v. *Mayor*, 5 N. Y. 369, 374. The United States has no choice; all property held by it must be held in a governmental capacity; otherwise, it is held in the teeth of the law. To illustrate: the Canal charges tolls as any private carrier, earns profits, and competes with the transcontinental railroads. But can there be any doubt that in its construction and operation the central government is exercising a governmental, and even an ordinary governmental function? If not, the whole enterprise is an usurpation and in defiance of the law.

This distinction should be borne in mind in considering the effect of cases like *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; and *Helvering* v. *Powers*, 293 U. S. 214; upon which the decision of the Appellate Division was chiefly rested. In these cases it was held that the State or one of its subdivisions had engaged in business as a private trader; and had therefore sacrificed its ordinary immunity from Federal taxation. The States may do that very thing. The Federal Government cannot. There is not room for the distinction, drawn by the opinion in this case, between the Panama Rail Road Company as a governmental agency and the Panama Rail

Road Company as a private enterprise. In holding the railroad and operating it as it does, the Government is proceeding within governmental lines, or it is proceeding *ultra vires* and without warrant of law. The presumption that it is *not* proceeding in this latter aspect, it is submitted, is too strong to be overthrown.

These considerations present a situation which involves not only a conflict of State and Federal decisions, but a public question of great importance, which questions cannot be adequately dealt with on a motion of this character, or even on an application for a writ of certiorari, should that procedure be deemed necessary; and which in any aspect merit examination and review by the Supreme Court of the United States.

RICHARD REID ROGERS,
Relator and Proposed Appellant, Pro se.

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CHARLES ELMOR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 139

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF RICHARD REID ROGERS,
Appellant,

vs.

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

APPELLANT'S REPLY TO THE MOTION TO DISMISS OR AFFIRM.

RICHARD REID ROGERS, *Pro se.*

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 139

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF RICHARD REID ROGERS,
Appellant,

against

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,
Appellees.

APPELLANT'S BRIEF IN REPLY TO STATEMENT OPPOSING JURISDICTION.

The only question discussed in the Appellate Division, as the appellee admits in his statement opposing jurisdiction, was the constitutional question. He is frank to admit, moreover, that the contention that the appellant was an independent contractor was not strenuously urged in the Court of Appeals. What occurred in that connection was this:

The appellant's case was a test case, because not only his annual salary as General Counsel was involved, but also

the salaries of other officers of the Panama Rail Road Company. With the appellee's permission, this statement was made in open court. At the end of the argument, when the Assistant Attorney-General raised the point of independent contractor, the following colloquy took place between the bench and the Assistant Attorney-General.

> Judge Lehman: "You do not wish the case decided upon that point?"
>
> Assistant Attorney-General: "No, we want a decision upon the merits."

In the cases cited by the Attorney-General (see *Lynch* v. *New York*, 293 U. S. 53, 54; *Cuyahoga River Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 304), the judgments below were rested upon *two* grounds, one Federal and one not Federal, and that circumstance was stressed. In the last-cited case this Court expressly said that "*in the absence of an opinion by the court below*, it was impossible to say whether its judgment rested upon State questions adequate to sustain it."

In the case at bar, no other question was raised by the petition for *certiorari* than the constitutional question; the Appellate Division, to which the writ was returned, dealt with no other; and the judgment of that court was rested solely upon the constitutional ground.

But even if the argument as to an independent contractor had been raised by the evidence, as it was not pressed or even decided the constitutional question would still have been involved.

Respectfully submitted,

RICHARD REID ROGERS,
Appellant, Pro se.

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Supreme Court,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 139.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS,

Appellant,

vs.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Appellees.

BRIEF FOR RELATOR-APPELLANT

RICHARD REID ROGERS,
Relator and Appellant, Pro Se.

The Hecla Press, 225 Varick Street, N. Y. C. Tel. WAlker 5-1480.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS, Appellant, v. MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York, Appellees.	No. 139.

BRIEF FOR RELATOR-APPELLANT.

Statement.

This case, a test case, involves the question of the exemption from State income taxation of the salaries of the officers of the Panama Rail Road Company, a United States Government agency employed in the construction, operation and maintenance of the Panama Canal. As the case was decided in the Appellate Division it also necessarily involves the immunity of the Panama Rail Road Company itself from State taxation.

The case comes up specifically upon the salary paid the relator as general counsel for the company for the years 1927, 1928 and 1929. This salary was reported in the rela-

tor's State income returns for those years, but no tax was currently paid, upon the ground that the salary was exempt. The tax, having been subsequently imposed by the State Tax Commission, was paid under protest, and a writ of certiorari sued out in the Appellate Division of the Supreme Court of New York. In the Appellate Division the constitutional point of immunity raised by the relator was overruled and the tax sustained upon the ground that the Panama Rail Road Company engaged in certain commercial activities. On a subsequent appeal to the Court of Appeals where the same point was raised the case was affirmed without opinion (271 N. Y. 39).

Before the State Courts, the relator contended: (1) that the Panama Rail Road Company was a wholly owned instrumentality of the United States Government, employed in the maintenance, operation and protection of a work of national importance, to wit: the Panama Canal; (2) that as such instrumentality the Panama Rail Road Company was exempt from State taxation; and (3) that the Railroad Company being so exempt, the fixed salaries paid to its officers and employees were likewise exempt.

None of these points was contested in the opinion of the Appellate Division; apart from the fact that the Appellate Division held that the Panama Rail Road Company was not engaged in the conduct of an essential or useful governmental function and, therefore, possessed no immunity. This is the principal question which will be discussed on this appeal; but as preliminary to this discussion the authorities and evidence which support the relator's postulates will previously be presented.

Specification of Errors.

1. The Court of Appeals erred in affirming the order and judgment of the Appellate Division of the Supreme Court holding that the New York State income tax law, in so far as it authorized the taxation of the annual salary paid by the Panama Rail Road Company to the appellant, was valid

—the Constitution of the United States and particularly Article 1, Section 8 thereof, to the contrary notwithstanding.

2. The said Court erred in failing to render judgment in favor of the appellant.

3. The said Court erred in affirming the holding that the Panama Rail Road Company, even though an instrumentality of the United States Government, had forfeited its immunity from State taxation because it engaged in certain commercial activities; and that the salaries paid its essential officers, including the annual salaries paid the appellant for the years 1927, 1928 and 1929, were therefore subject to State income taxation.

4. The said Court erred in not holding that such commercial activities, even if conducted at a profit, were only incidental to the main purpose of the Panama Rail Road Company as an adjunct of the United States Government in carrying on the work of construction, maintenance and protection of the Panama Canal, which main purpose was within and not a departure from the usual governmental functions of the United States.

Jurisdictional Question.

The respondent moved to dismiss the case for lack of jurisdiction in this Court upon the ground that the relator might possibly have been an independent contractor rather than an officer of the Panama Rail Road Company, and that the decision of the Court of Appeals might possibly have rested on this ground. During the course of the oral argument when this point was raised (the Attorney General in his motion to dismiss admits the "question was not strenuously urged") the following colloquy took place: Judge Lehman: "You do not wish the case decided on that ground, do you?" Mr. Mesnig, Assistant Attorney General for New York: "No, sir, we want a decision upon the merits." Naturally so,

inasmuch as the case was a test case involving the salaries of all other officers of the company, and a decision upon a special point would not have settled the main controversy.

However, it is not true, as contended, that the record is silent on the subject, for it definitely appears that the relator "is and has been for many years an officer, to wit, General Counsel, of the Panama Rail Road Company under a fixed salary per annum" (fol. 71), and that there was no other compensation outside of the salary (fol. 49). It is difficult to see, moreover, why the constitutional question was not involved even if the Attorney General's point were sound, for there would still arise the fundamental questions whether the State could tax any compensation paid by a Federal instrumentality to an essential officer, or whether the salary was not in substance a governmental salary.

I.

The Panama Rail Road Company is an instrumentality of the Government of the United States.

This point is no longer contested. Nevertheless the decisions, laws and documents which support the caption should be referred to for the convenience of the Court.

In *United States ex rel. Skinner & Eddy Corporation* v. *McCarl*, 275 U. S. 1, 6, this Court had occasion to review the private corporations then employed as Government instrumentalities, some of which had been incorporated under State laws. Referring to the Panama Rail Road Company, this Court said:

> "For many years before the war the Government had employed the Panama Rail Road Company as its instrumentality in connection with the Canal."

In the footnote to this decision reference was made to a letter of Mr. William H. Taft, then Secretary of War, and as such officially in charge of the Canal, transmitting the first report of the Isthmian Canal Commission, under date

of December 1, 1904 (p. 14). After referring to the acquisition from the French Canal Company of practically all the stock of the Railroad Company—an ownership shortly thereafter made complete (Rec., fol. 73)—the Secretary says:

> "The United States purchased the shares in the company for the purpose of using the railroad to assist it in the construction of the canal, and it is quite evident that this purpose will be largely defeated unless the representatives of the United States may use the railroad without let or hindrance in canal construction. Of course, under the franchise authorizing the operation of the railroad company, there is an obligation upon those who run the railroad and use the franchise to perform the duty of a common carrier. It is entirely feasible fully to perform such a duty and still to use the railroad as an auxiliary instrument in the construction of the canal."

This Court also referred to the annual report of the Panama Rail Road Company for the year 1904 (p. 9), where was quoted the report of the Interstate and Foreign Commerce Committee of the House of Representatives upon the Panama Rail Road Company, dated March 3, 1902, as follows:

> "The successful construction of the Panama Canal demands that the United States shall own and operate the Panama Railroad. In doing this, however, neither its earning capacity nor its efficiency as an artery of commerce should be impaired."

Further reference may be made to the following Acts of Congress and executive orders:

The United States Government having finally decided upon the construction of an isthmian canal, Congress passed the Act of June 28, 1902 (32 U. S. Stat. 481), appropriating $40,000,000 for the acquisition of all the property, concessions and rights of the French Canal Company in Panama. The purchase, as consummated, included substantially all the stock of the Panama Rail Road Company. Thereafter our Government acquired rights to the Canal Zone across

the Isthmus from the newly-created Government of Panama; and the President, Mr. Theodore Roosevelt, to whom was entrusted by Congress all powers relating to the execution of the enterprise, laid down instructions for its administration in a letter to the Secretary of War which possesses the importance of a charter. He said (fol. 97):

> "By virtue of the ownership by the United States of about sixty-nine seventieths of the shares of the capital stock of the Panama Railroad the general policy of the managers of said road will be controlled by the United States. As soon as practicable I desire that all the members of the Isthmian Canal Commission be elected to the board of directors of the road, and that the policy of the road be completely harmonized with the policy of the Government of making it an *adjunct* to the construction of the canal, at the same time fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama."

By Section 2 of Act of Congress approved August 24, 1912 (37 Stat. 560-569), commonly known as "The Panama Canal Act," all orders, regulations and ordinances with respect to the Panama Canal promulgated by the President were ratified and confirmed. Moreover, by Section 6 of the same Act it was specifically provided as follows:

> "The President is also authorized to establish, maintain and operate, through the Panama Railroad Company or otherwise, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses, and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs, and supplies for vessels of the Government of the United States, and, incidentally, for supplying such at reasonable prices to passing vessels, in accordance with appropriations hereby authorized to be made from time to time by Congress as a part of the maintenance and operation of the said canal. Moneys received from the conduct of said business may be expended and reinvested for such purposes without being covered into the Treasury of the United States; and such moneys are hereby appropriated for such

purposes, but all deposits of such funds shall be subject to the provisions of existing law relating to the deposit of other public funds of the United States, and any net profits accruing from such business shall annually be covered into the Treasury of the United States."

The following additional Acts, bearing upon the public status of the Panama Rail Road Company and showing how closely the railroad and steamship line and its employees are identified with the Government, may be cited:

By Act of Congress approved March 4, 1907 (34 Stat. 1368-1371), the Congress appropriated $2,298,367.50 to pay for the outstanding 4½ percentum mortgage bonds of the Panama Rail Road Company.

By Act of Congress approved May 27, 1908 (35 Stat. 384, 387), the Congress appropriated (1) $1,550,000 to enable the Secretary of War to purchase two steamships for the Panama Rail Road Company; (2) $1,100,000 to continue the equipment and construction of the Panama Rail Road; and (3) made the general appropriation for the Panama Canal available to reimburse the Panama Rail Road Company for marine losses or for losses due to destruction of or damage to its plant, equipment or commissary supplies by fire.

By Act approved March 4, 1911 (36 Stat. 1449), the Congress stipulated that the Panama Rail Road Company should not be required to give bond in any contracts it might make to furnish services, material or supplies to the Army, Navy or Marine Corps or other departments of the Government.

By Act of Congress approved March 4, 1909 (35 Stat. 1024, 1027), the Congress appropriated (1) $1,980,000 for the relocation of the Panama Rail Road; and (2) continued the appropriation to reimburse the Panama Rail Road Company for marine and fire losses.

By Act of Congress approved June 25, 1910 (36 Stat. 771), the Congress appropriated (1) $2,000,000 for the relocation of the Panama Rail Road; (2) continued the appropriation to reimburse the Panama Rail Road Company for marine and fire losses; and (3) cancelled the obligation of

the Panama Rail Road Company to pay to the United States, as successor to the rights of Colombia and Panama, the annual subsidy of $250,000 required to be paid by the Panama Rail Road Company to Colombia under the original concession.

By Act of Congress approved March 4, 1911 (36 Stat. 1449), the Congress directed (1) that the Panama Rail Road Company should carry no insurance to cover marine or fire losses; and (2) make no further payment upon the principal or interest on notes theretofore given by it to the United States for moneys appropriated for its use; such moneys representing the funds advanced for the retirement of the company's 4½ percentum bonds.

By Act of Congress approved August 24, 1912 (37 Stat. 560-569), the President was authorized to determine and adjust all personal injury claims in connection with the construction, maintenance and operation or sanitation of the canal or of the Panama Rail Road Company.

By Act of Congress approved July 1, 1916 (39 Stat. 332-334), the Congress appropriated funds for the purpose of reboilering the steamers *Ancon* and *Cristobal* belonging to the Panama Rail Road Company.

By Act of Congress approved September 7, 1916 (39 Stat. 742-750), the Congress, having provided a scheme of compensation for injuries sustained by employees in the Government service and having appropriated public funds for the payment of such compensation, specifically defined the term "employee' under the Federal Compensation Act to include "all civil employees of the * * * Panama Rail Road Company."

By Act of Congress approved August 1, 1914 (38 Stat. 674, 679), the Congress provided for the consolidation of the functions of receiving, disbursing and accounting for the funds of the Canal Zone Government and the Panama Rail Road operations on the Isthmus with the functions of receiving, disbursing and accounting for the funds appropriated for the Panama Canal.

By Act of Congress approved May 14, 1928 (45 Stat. 532), the Treasurer of the United States was authorized and di-

rected to cancel and surrender to the Panama Rail Road Company the notes given to the United States prior to 1911, with respect to which payment of interest and principal had been discontinued by Section 2 of the Act approved March 4, 1911.

By Act of Congress approved March 2, 1931 (U. S. Code, 1935, Title 48, Secs. 1371 *et seq.*), the Congress provided for a compensation and retirement system, toward which United States public funds were contributed, for "all employees of the Panama Canal on the Isthmus of Panama, and all employees of the Panama Rail Road Company, on the Isthmus of Panama, who are citizens of the United States and whose tenure of employment is not intermittent nor of uncertain duration."

In the Temporary Economy Act of June 30, 1932 (being Part II of the Legislative Appropriations Act for 1933, 47 Stat. 399), the Government provided for a compulsory furlough without salary of all Government employees for the fiscal year ending June 30, 1933. The term "officer" or "employee" in Section 104 of the special Act was defined to mean "any person rendering service in or under any branch of service of the United States Government." Under a permissive privilege contained in Section 101 of the said Act, the President of the United States, under an order dated July 25, 1932, provided, in the case of the Panama Rail Road Company, for an equal distribution of the enforced furlough without pay through the twelve months of the year, thus in effect reducing their monthly pay and salaries by 8⅓ percentum per month (fol. 78).

In both the Temporary Economy Act (Sec. 108, 47 Stat. 402) and the later Economy Act (by cross-reference in Sec. 4, 47 Stat. 1513) it was provided as follows:

> "*Government Corporations*
>
> Sec. 108. In the case of a corporation the majority of the stock of which is owned by the United States, the holders of the stock on behalf of the United States, or such persons as represent the interest of the United States in such corporation, shall take such action as

> may be necessary to apply the provisions of sections 101, 102, 103, 105 and 107 to offices, positions, and employments under such corporation and to officers and employees thereof, with proper allowance for any reduction in compensation since December 31, 1931."

The importance attached to the steamship line of the company is illustrated by the various department rulings:

Under date of March 28, 1927, a question having arisen as to the advisability of abandoning the line of steamships owned and operated by the Panama Rail Road Company connecting the Panama Canal with the continental United States, and substituting therefor service to be supplied by private corporations, and the matter having been referred to the chief co-ordinator, General Smithers, the latter, in a communication to the Shipping Board, advised against the abandonment of the steamship line, as follows (fol. 104):

> "No establishment of Government dependent upon shipping for the fulfillment of its mission in Government may with impunity be placed in a position of forced dependence upon shipping that is less sensitive to the pressure of its own dispensing authority than are the vessels operated in its own service; nor may it safely be forced into dependence upon vessels whose movements are less responsive to the orders or desires of its own dispensing authority than are vessels operated directly under its own command."

In a letter to the President of the United States, dated April 27, 1928, the then Secretary of War, Mr. Davis, dealing with the same subject, declared (fol. 113):

> "The line is an integral part of the Panama Canal and indispensable in its discharge of its normal responsibilities. The successful operation of this great enterprise, which is of vital importance to the United States, demands absolute security as to its line of supply to this country."

The position of the Secretary of War was approved by the President of the United States; and the policy thus out-

lined has been continued by all other Secretaries of War, through whose department the operation of the Panama Rail Road Company is controlled (fol. 82).

The War Revenue Act of 1917, Section 500 (40 Stat. 314), provided for a tax of 3 percentum upon the amount paid for transportation by rail and water. It further provided, in Section 502, as follows:

> "No tax shall be imposed under section 500 upon any payment received for services rendered to the United States or any State, Territory, or the District of Columbia. The right to exemption under this section shall be evidenced in such manner as the Commissioner, with the approval of the Secretary, may by regulation prescribe."

The question whether transportation services rendered to the Panama Rail Road Company would be subject to the tax mentioned having been referred to the Commissioner of Internal Revenue, the Internal Revenue Commissioner, under date of March 11, 1918, ruled as follows (fol. 122):

> "In reply, you are advised that payments made from the treasury of the United States for transportation or other services are exempt from the tax, and as payments for services rendered the Panama Rail Road Company are in substance payments for services rendered the United States, under the provisions of section 502 of the Act they are exempt from the tax."

The above provisions as to tax on transportation services were repeated without substantial change in Section 500 of the Revenue Act of 1918 (40 Stat. 1101), Section 502 of the Act of 1917 becoming 500(h) of the Act of 1918 (40 Stat. 1102). By Treasury Department Regulations No. 49, referring to these provisions in the Act of 1918, it was provided as follows (Corporation Trust War Tax Service, 1919) (fol. 124):

> "Article 70. Government Agencies. Transportation services rendered to agencies of the United States are exempt from the tax. Such agencies include the American National Red Cross, United States Shipping

> Board Emergency Fleet Corporation, United States Food Administration Grain Corporation, United States Fuel Administration, United States Housing Corporation, Commission on Training Camp Activities, War Savings Committee, Liberty Loan Committee, War Industries Board, Federal Farm Appraisers, Federal land banks, Federal reserve banks, *Panama Railroad Co.*, and similar agencies supported by Government funds."

A question having arisen as to whether the Panama Rail Road Company was subject to Capital Stock Tax imposed by the Federal Government under Section 1000 of the Revenue Act of 1918 (40 Stat. 1126), the matter was referred to the Commissioner of Internal Revenue, at Washington, and the company was advised as follows (fol. 128):

> "Kindly inform this office of any provisions in the corporation's charter or of any existing agreement involving the liability of your company for taxes.
>
> In the absence of such requirements it would appear that the Panama Rail Road Company is a Government agency and is not liable for Capital Stock tax. If this assumption is correct, you are at liberty to file claim for refund of $14,896 amount of tax paid, using the enclosed form, and stating full particulars."

A question having arisen whether the Panama Rail Road Company was subject to Federal income taxes, the matter was again referred to the Commissioner of Internal Revenue, and under date of September 20, 1926, the Panama Rail Road Company was advised as follows:

> "It appears that you are a domestic corporation and that under the authority of section 1 of the Isthmian Canal Act of June 28, 1902, the United States acquired your entire capital stock. It further appears that for the purposes of the tax imposed by section 500 of the Revenue Act of 1917, it was held that you were an agency of the United States Government.
>
> Inasmuch as you are a governmental agency you are not required to file Federal income tax returns or to pay Federal income taxes."

II.

If the Panama Rail Road Company is exempt from State taxation, the fixed salaries paid its employees are likewise exempt.

Neither is this point contested in the opinion of the Appellate Division, nor heretofore by opposing counsel in his various briefs; the argument being that the Panama Rail Road itself is not exempt.

The fundamental doctrine that the instrumentalities of the Federal Government are exempt from State taxation being conceded, the corollary, that the income derived from such instrumentalities is also exempt, has thus been laid down by the Supreme Court:

In *Gillespie* v. *Oklahoma,* 257 U. S. 501, 505, this Court held that the lessee under oil leases of Indian lands, made by the United States in carrying out its duties towards the Indian tribes, was an instrumentality employed by the Government (p. 504), and that the income derived by the lessee from the leases could not be taxed as part of the lessee's income under the State income tax law of Oklahoma. The Court said: "In cases where the principal is absolutely immune from interference, an inquiry is allowed into the sources from which net income is derived, and if part of it comes from such source the tax is *pro tanto* void." * * * "If the property is exempt, the income from it is also exempt" (p. 505).

The same principle was restated in *Metcalf* v. *Mitchell,* 269 U. S. 514, 522:

> "Just what instrumentalities of either a state or the Federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers are immune from the taxing power of the other, * * *

> and when the instrumentality is of that character, *the immunity extends not only to the instrumentality itself but to income derived from it.*" (Italics appellant's.)

There are many illustrations of this principle to be found in the reports. A few of the most pertinent, in addition to the leading case of *M'Culloch* v. *Maryland*, 4 Wheat. 316, hereafter discussed, will be referred to.

In *Weston* v. *Charleston*, 2 Pet. 449, the Constitution having delegated to the Congress the power to "borrow money," it was held that "stock," i. e., bonds, of the United States held by citizens of South Carolina could not be taxed.

In *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 584, 601, 652, s. c., 158 U. S. 601, 618, 693, it was held, the full court agreeing upon this point (see *Evans* v. *Gore*, 253 U. S. at p. 255), that municipalities being agents of the State, the Federal Government could not levy an income tax upon the interest received by private investors from municipal bonds.

In *Macallan Co.* v. *Mass.*, 279 U. S. 620, the doctrine of the foregoing case was further extended to holding unconstitutional an excise tax proportioned to income levied on corporations for the privilege of doing business, to the extent that any portion of such tax was measured by income received from Government bonds.

In *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435, 448, a revenue cutter being held to be an instrumentality of the United States, it was further held that the master thereof could not be taxed for county rates upon the value of his position. The argument of the Supreme Court, very applicable here, was as follows:

> "Is the officer, as such, less a means to carry into effect the great objects than the vessel which he commands, the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law? These inanimate objects, it is admitted, cannot be taxed by a State, because they are means. Is not the officer more so, who gives use and efficacy to the whole? Is not compensation the means

> by which his services are procured and retained? It is true it becomes his when he has earned it. *If it can be taxed by a State as compensation, will not congress have to graduate its amount, with reference to its reduction, by the tax?"* (Italics appellant's.)

In *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 41, the Pacific railroads having received franchises to construct and operate continental roads from the Government of the United States, it was held that the State of California could not include their franchises in a valuation of railroad property for purposes of taxation.

In *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, the converse of the proposition laid down in *Gillespie* v. *Oklahoma, ubi supra,* was affirmed by the Supreme Court. It was there held that the Federal income tax could not be applied to income derived by lessees from oil leases of State school lands.

In *Panhandle Oil Co.* v. *Miss.*, 277 U. S. 218, it was held that the State gasoline tax could not be collected from private sellers on gasoline sold to the United States for use of its coast guard fleet and veteran's hospital, the court saying that a State may not lay a tax on sales by which the United States "secures the things desired for its governmental purposes." This doctrine was later extended to a gasoline "storage" tax: *Graves* v. *Texas Co.*, decided May 18, 1936.

In *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, the complement of the foregoing proposition was applied in the case of sales to a State agency. It was there held that the Federal excise tax of five percentum (5%) on the price of motor vehicles could not be applied to sales to the police force of a State municipality.

Finally, "where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute" (*Indian Motocycle Co.* v. *United States*, 283 U. S. at p. 575).

This principle seems to be recognized by the Supreme Court in the very latest case touching upon the subject: *Helvering* v. *Powers*, 293 U. S. 214.

III.

The immunity from State taxation of the Panama Rail Road Company as an instrumentality of the United States Government is not lost by reason of the fact that incidentally it engages in certain commercial activities.

The Attorney General for New York, supported by the opinion of the Appellate Division, contends to the contrary; and the proposition stated in the caption thus becomes the focal point of argument in this Court.

The Appellate Division deals with the Panama Rail Road Company as though it were a Government-controlled agency engaged *solely* in commercial operations. It is the fault of this opinion that it disregards the truly governmental functions which the Panama Rail Road Company discharges and looks only to certain commercial activities which are in fact subordinate to the main purpose of the company.

It is seldom that a governmental agency will be found to be exclusively such. The point is well illustrated by the following excerpt from the decision of this Court in *Emer. Fleet Corp.* v. *Western Union*, 275 U. S. 415, 424, where it was held that the Fleet Corporation was entitled to governmental telegraph rates although competing with private shipping.

> "The conduct of business in competition with private interests may of course be for a public purpose, Standard Oil Co. v. City of Lincoln (post, p. 504). Other departments which compete with private business have long enjoyed the government rate without question. The post office has since 1872 competed with bankers through money orders; since 1910 with savings banks by receiving deposits on interest; since 1913 with express companies through the parcel post. The War Finance Corporation has since 1918 competed with private bankers. The War Department has by its Mississippi River barge lines competed since 1920 with the railroads. Equally with all of these, the Fleet Corporation is acting for and on behalf of the United States."

The test of this much-debated question, it seems to this relator, is not whether the governmental agency, in the course of its operations occasionally does those things which ordinarily fall within the sphere of the private trader, but whether private trade is the *raison d'etre* for its existence. If so, the agency loses its immunity. But if its main or predominant purpose is governmental and its commercial activities merely incidental, it retains it. This proposition seems to be well supported by the decisions of this Court.

The commercial activities referred to by the Appellate Division are the operation of steamships, railroads, stores, hotels and dairies.

It is true that the company operates a line of steamers between New York and the Canal Zone; but the maintenance of this line is not for the primary purpose of engaging in commercial competition with other lines. The steamship line is maintained under a policy of many years' standing "for the purpose of maintaining an independent and wholly-controlled line of communication between the United States and the Canal Zone" (fols. 75, 56). It affords a concession to the Government of 25 percentum from tariff rates; and, in the interest of all Government employees on the Isthmus, whose health requires annual vacations to northern climes, transports those employees between the Isthmus and the United States at as low a rate as $20 per passage, much less than the actual cost. It likewise assures the proper provisioning of the Canal. The greater portion of its services is taken up with these functions. It is operated at a deficit (fols. 57, 58). It is the policy of the Government to control this line of communication. As said by the Secretary of War in the passage quoted above:

> "It is an integral part of the Panama Canal and indispensable in its discharge of its normal responsibilities. The successful operation of this great enterprise, which is of vital importance to the United States, demands absolute security as to its line of supply to this country" (fol. 113).

It is true that it accepts outside freight and passengers to the limited extent that its ships afford (fol. 57); but surely the Government cannot be criticized for seeking to diminish its losses incurred in an essential governmental undertaking by charging for certain services which are wholly incidental to the main purpose. If it were otherwise, a premium would be placed on inefficiency; and only those agencies which were badly managed and run at a loss would preserve their tax immunity. The Panama Canal itself, which charges tolls, in this aspect would lose its immunity. As said by this Court in a somewhat similar situation (*United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73):

> "If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government. The practice is not unusual in respect to similar public works constructed by state governments." Cf. *Aswander* v. *Valley Authority*, 297 U. S. 288, 333.

The railroad also conducts a commissary department on the Isthmus. But this is for Governmental employees only, and was established so that the employees would not be at the mercy of the merchants of Panama and Colon (see letter of Mr. Taft transmitting his first report, cited by the Supreme Court, *ante*, p. 4). It is doubtful whether without such a commissary the Canal could be operated successfully at all. What is said of the commissary is true of the dairies and hotels.

As to the railroad: It is evident that the railroad was not only absolutely essential to the construction of the Canal but is also necessary to its continued maintenance and operation. Moreover, the railroad must always be held in reserve to provide against the contingency of accidental stoppage of the Canal.

But over and beyond this the maintenance of the railroad and the company itself is indispensable for other reasons. It was quite impossible for the Government, without disregarding its franchise obligations, to discontinue its opera-

tion. The concessionary contract of 1867 with Colombia, subsequently effective with respect to the Republic of Panama, provided for the perfection of the work of the railroad, "in order that it may better answer the necessities of the commerce of the world." See Bristow Report to Secretary of War, June 24, 1905, p. 323. Both President Roosevelt in his original order (*supra*) and Mr. Taft in his first report recognized this obligation. The latter said:

> "Of course, under the franchise authorizing the operation of the railroad there is an obligation upon those who run the railroad and use the franchise to perform the duty of a common carrier" (doc. cited above).

And that is what President Roosevelt doubtless referred to when in his charter letter cited above he spoke of the railroad "fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama."

The Act of Congress of August 24, 1912 (commonly known as "The Panama Canal Act"), also specifically authorized the President "through the Panama Rail Road Company, or otherwise, to maintain dry docks, repair shops, docks, wharves and warehouses and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs and supplies for the Government and passing vessels at reasonable prices" (37 Stat. 560, 569). Without these facilities for transiting vessels it is hardly open to doubt that the Canal could not be successfully operated at all. But is the Panama Rail Road Company to be deprived of its immunity as a governmental agency *simply because it charges for this service?*

The question here involved, and, according to the decision below, the only important one in the case, seems to this relator to have been settled by the very first case involving the question which ever came before the Supreme Court of the United States—the great case of *M'Culloch* v. *Maryland*, 4 Wheat. 316. The State of Maryland undertook to tax the old Bank of the United States. The Bank of the United States, as is well known, was owned by private individuals;

it engaged in commercial banking, from which it derived profits and paid dividends; but this circumstance was not deemed to destroy its immunity from State taxation. This case settles the following propositions: (1) that in the choice of means to carry out its powers the Federal Government "may adopt any which were appropriate and which were conducive to the end" (p. 415); (2) that the employment of a corporation was an appropriate means (p. 409); and (3) finally that such instrumentalities as the Congress in its "discretion" chose to employ could not be taxed by the States. "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States" (p. 429). The conclusion was: "On just theory, a total failure of the original right to tax the means employed by the Government of the United States for the execution of its powers. The right never existed, and the question whether it has been surrendered cannot arise" (p. 430).

The doctrine of this case was reaffirmed in *Weston* v. *Charleston* (2 Pet. 449, 467), where it was declared that the right to impose such a tax "to any extent, however inconsiderable, is a burden on the operations of the Government" (p. 468).

In *Osborn* v. *United States Bank*, 9 Wheat. 738, 859, however, the precise point upon which this case was decided below was considered by the Supreme Court, and decided the other way. The argument, or rather reargument, there against tax exemption was that the Bank of the United States was an individual concern founded upon contract between individuals, "having private trade and private profit for its great end and principal object." But the Court overruled this argument upon the ground that the bank was "not considered as a private corporation, whose *principal* object is individual trade and individual profit; but as a public corporation, created for public and national purposes" (p. 860).

Thus was clearly recognized the distinction laid out above. But how much more true, than in the case of the old national bank, does the doctrine of predominant purpose apply to the Panama Rail Road Company, which is entirely owned by the Government itself, and is maintained and operated as a necessary "*adjunct*" in the operation, maintenance and even protection of the Panama Canal; and not primarily for the purpose of running a commercial railroad or steamship line or commissary in competition with other private interests; or for the sake of earning dividends! The phraseology employed in *Osborn* v. *United States Bank* exactly fits the case at bar.

What was true of the old national bank is likewise true of the numerous national banks created under the National Banking Law passed in 1864. These banks are all held in private ownership, are commercial enterprises and are run for profit. Yet without the consent of Congress they could not be taxed by the States even on their shares held in private ownership. That such consent was necessary is abundantly established by the cases of *M'Culloch* v. *Maryland*, 4 Wheat. 316; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Weston* v. *Charleston*, 2 Pet. 449; *People* v. *Weaver*, 100 U. S. 539, 548; *Talcott* v. *Silver Bow County*, 139 U. S. 438, 440; *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664, 668; *First National Bank* v. *Adams*, 258 U. S. 362; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 106, 107.

Many other cases might be referred to as recognizing the principle that participation in commercial activities does not destroy the immunity from State taxation of a Federal agency. Reference will be made at this point to only one—The United States Emergency Fleet Corporation, which this Court has held to be a department of the United States Government (*Emergency Fleet Corporation* v. *Western Union Tel. Co., ubi supra*); and which is engaged almost entirely in commercial activities.

In *United States* v. *Coghlan,* 261 Fed. 425, 426, it was held that the property of this corporation was exempt from State taxation. The Court said:

> "It was shown that all the stock of the Fleet Corporation was owned by the government, and that all it did was done for government account, and that all the profits which it made would inure to the government, which would have to stand all the losses. Under such a state of facts, it is unnecessary to inquire whether for all purposes the Fleet Corporation is the Government. It suffices that it is a governmental agency, exclusively employed in governmental work, and as such its property is not liable to state taxation."

To the same effect was the decision of the Circuit Court of Appeals for the Ninth Circuit in *Kings County* v. *United States Emergency Fleet Corporation,* 282 Fed. 950; the Court observing:

> "If, taking a view most favorable to the defendants, but hardly warranted by the record, we assume the property was acquired with funds coming from the 'sale' of the capital stock of the Fleet Corporation to the Government, we would have a case where the Government, for its own convenience and for the more expeditious dispatch of public business, instead of acting directly through a recognized governmental department, brings into existence a new agency in the form of a private corporation, which it controls, and in which it holds all of the stock, and to which it contributes its entire capital."

Both of these cases were cited with approval upon this point by the Supreme Court in *Clallam County* v. *United States,* 263 U. S. 341, 345.

In passing it should be observed that the fact that the United States is the sole stockholder of the Panama Rail Road Company is a circumstance to which the Supreme Court has heretofore attached some importance. Thus, in *Railroad* v. *Peniston,* 18 Wall. 5, 32, the Court commented on the fact that the Government owned none of the stock

in the Pacific Railroad, whose property it was sought to tax; and in *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 177, the Court commented on the foregoing circumstance. See also *Helvering* v. *Powers,* 293 U. S. at page 223.

The Appellate Division rested its conclusion on the doctrine of:

> *South Carolina* v. *United States,* 199 U. S. 437.
> *Ohio* v. *Helvering,* 292 U. S. 360.
> *Helvering* v. *Powers,* 293 U. S. 214.
> *Metcalf* v. *Mitchell,* 269 U. S. 514.

In the *South Carolina* case the Court was dealing with an excise tax, the power to levy which was specifically conferred upon Congress, and hence a power not to be limited by State action. The Court concluded:

> "Whenever a State engages in a business which is of a *private nature,* that business is not withdrawn from the taxing power of the nation."

The doctrine of this case was reaffirmed in *Ohio* v. *Helvering,* where the controlling principle was thus stated (p. 369):

> "If a State chooses to go into the business of buying and selling commodities, its right to do so may be conceded * * * but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a State enters the market place seeking customers it divests itself of its quasi sovereignty *pro tanto,* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned."

In *Helvering* v. *Powers* the compensation of the trustees of the Boston Elevated Railroad Company appointed by the State of Massachusetts was held to be taxable under the Federal income tax law. The Boston Elevated was a wholly-owned private corporation which had gotten into serious financial difficulties. On account of the importance of the enterprise the State temporarily took over its operation

through three trustees. From the gross receipts, all costs of operation, "of which the compensation of the trustees is undoubtedly a part" (p. 223), and a sum equal to the dividends upon the preferred stock sold by the company to raise funds to enable the State to carry on, were to be paid. When all deficits incurred under State operation had been made good from earnings, it was provided the company should be turned back to private control. The Court commented on the fact that the railroad property remained "*in private ownership*" (p. 223); that the salaries paid the trustees were a charge against the company; and that the State had engaged in business which constituted "*a departure from usual Governmental functions.*" It therefore applied the doctrine of the dispensary cases.

In these latter cases, while the question of predominancy was not discussed nor decided as in *Osborn* v. *United States Bank,* it seems to be a fair implication that it was assumed. The distinction to be drawn from all the cases, therefore, is that where the main purpose is to enter the field of private commerce as a trader, the immunity from taxation is lost; but where the main purpose is in fact governmental and commercial activity is only incidental, it remains.

It has become customary, in dealing with the question here presented, to regard the States and the Federal Government upon an exact parity with each other; but that was not the original position of this Court. Thus, in *M'Culloch* v. *Maryland,* Chief Justice Marshall said at page 425:

> "The two cases are not upon the same reason. The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the Government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the meas-

> ures of a government created by others as well as themselves. The difference is that which exists, and always must exist, between the action of the whole on a part, and the action of a part upon the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

But whether or not this doctrine of supremacy is to be given full force and effect there is undoubtedly a difference between State and central government in regard to this question. The United States, being exclusively a government of delegated powers, has no authority under the Constitution to engage in any form of private business. As said by Justice Gray, delivering the opinion of the Supreme Court in *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 155, 158:

> "The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All property must be held, just as taxes are levied, to pay the debts and provide for the common defense and general welfare of the United States."

The United States, under the Constitution, therefore, stands in an entirely different posture from the States or their municipalities, which possess two powers, one governmental and public (e. g., the maintenance of streets and roads) and the other private (e. g., the operation of a transportation system). See *Lloyd* v. *Mayor*, 5 N. Y. 369, 374. The United States has no choice; all property held by it must be held in a governmental capacity; otherwise, it is held in the teeth of the law. To illustrate: the Canal charges tolls as any private carrier, earns profits, and competes with the transcontinental railroads. But can there be any doubt that in its construction and operation the central government is exercising a governmental, and even an ordinary governmental function? If not, and it be looked upon as a private undertaking, the Federal control of the Canal becomes a mere usurpation in defiance of the law.

This distinction should be borne in mind in considering the effect of cases like *South Carolina* v. *United States*, 199

U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; and *Helvering* v. *Powers*, 293 U. S. 214; upon which the decision of the Appellate Division was rested. In these cases it was held that the State or one of its subdivisions engaged in business as a private trader; and therefore sacrificed its ordinary immunity from Federal taxation. The States may do that very thing. The Federal Government cannot. There is not room for the distinction between the Panama Rail Road Company as a governmental agency and the Panama Rail Road Company as a private enterprise; a distinction only available in State cases. In owning the railroad and operating it as it does, the Government is proceeding within governmental lines, or it is proceeding *ultra vires* and without warrant of law. The conclusion that it is proceeding beyond its powers, it is submitted, may not be indulged.

IV.

Panama Rail Road salaries are in substance Government salaries.

In conclusion, attention should be called to the fact that the relator, as well as other employees of the Panama Rail Road Company, while not *direct* employees of the United States Government, according to the acts of Congress cited on pages 8 and 9 of this brief, are in substance such. If so, they would seem to fall within the exception from state taxation of "salaries, wages and other compensation received from the United States of officials or employees thereof," made by Section 359-f of the New York Tax Law itself, and judgment should have been rendered for appellant upon that ground.

Respectfully submitted,

RICHARD REID ROGERS,
Relator and Appellant, *Pro Se.*

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IN THE

Supreme Court of the United States

October Term, 1936.

No. 139.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS,

Appellant,

vs.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Appellees.

REPLY BRIEF FOR APPELLANT

RICHARD REID ROGERS,
Relator and Appellant, Pro Se.

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IN THE

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OCTOBER TERM, 1936.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS,

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MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Appellees.

No. 139.

REPLY BRIEF FOR APPELLANT.

Since relator's brief was filed, the United States Board of Tax Appeals has handed down a decision which will be reported under the title of *Case* v. *Commissioner,* in 34 B. T. A., in which it was decided that the salaries of the employees of the Port of New York Authority were exempt from Federal income taxation. The Port Authority is an incorporated institution organized by the States of New York and New Jersey for the purpose of promoting and improving the port facilities at New York. It controls and operates bridges and tunnels, for the use of which it charges established tariffs, owns an office building in the heart of New York covering a block 800 feet long by 200 feet wide and fifteen stories high, all of which is rented out at a profit, the thirteen upper stories to individual concerns, and has by competition put out of operation at least one privately-owned ferry company. In resisting the efforts of the National Government to tax the salaries of its employees, the State of New York took

exactly the same position as the relator here, viz., that notwithstanding the prosperous condition of the Port Authority and its ability to pay its officers from net earnings; notwithstanding it charges for the use of its tunnels and bridges, and has incidentally destroyed the business of a private ferry company; and notwithstanding its large earnings from offices and lofts rented to private individuals and firms, the main purpose of the Port Authority was and is governmental, and its commercial activities only incidental to the main purpose.

2. Inasmuch as the Attorney General of New York's brief lays great stress upon the fact that the Panama Rail Road Company, with the consent of the Government, is subject to suit, reference is made to the following authorities showing that that circumstance is not a determining factor:

In *Commissioner of Internal Revenue* v. *Harlan*, 80 Fed. (2nd) 660, 662, where it was held that the salary of the attorney for the Golden Gate Bridge and Highway District was not subject to Federal income taxation, the Circuit Court of Appeals for the Ninth Circuit said:

> "Petitioner contends that because section 10 of the Bridge and Highway Act conferred upon the Golden Gate Bridge and Highway District 'the power to sue and be sued,' it changed the governmental character of the agency. The fact that a sovereign may waive its immunity does not alter its nature, or affect the governmental character of the function its agency may be performing."

To the same effect are the decisions of this Court; see:

Trenton v. *New Jersey*, 262 U. S. 182, 191;
United States ex rel. Skinner and Eddy Corporation v. *McCarl*, 275 U. S. 1, 5 and 6.

Respectfully submitted,

RICHARD REID ROGERS,
Relator and Appellant, *Pro Se.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 139

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF RICHARD REID ROGERS,
Appellant,

vs.

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

JOHN J. BENNETT, JR.,
Attorney General of New York.
JOSEPH M. MESNIG,
Assistant Attorney General of New York.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 139

THE PEOPLE OF THE STATE OF NEW YORK UPON THE RELATION OF RICHARD REID ROGERS,

Appellant,

against

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Appellees.

APPEAL FROM THE SUPREME COURT, COUNTY OF ALBANY, STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

Now come the appellees in the above entitled cause, by their counsel of record, and move that the appeal herein be dismissed, or that the judgments appealed from be affirmed.

Jurisdiction.

Jurisdiction in this Honorable Court exists only if, in the cause ending in the judgment and final order appealed from, there was drawn into question the validity of a statute of a State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision of the highest Court of the State in which a decision could be had is in favor of the validity of such statute.

Judicial Code, §237(a) [28 U. S. C. § 344 (a)];
45 Stat. 54 [28 U. S. C. § 861 (a)].

It is well settled that, for jurisdiction to exist in this Honorable Court, it must appear affirmatively, not only that a Federal question was presented for decision in the highest State court, but that the decision of such a Federal question was necessary to a determination of the cause, that such Federal question actually was decided, or that the judgment as rendered could not have been given without deciding it.

Williams v. *Oliver,* 53 U. S. 111, 124;
Whitney v. *California,* 274 U. S. 357, 360.

In the instant cause, the decision (R. 136-140)* and opinion (R. 142-174) of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, unquestionably rested upon a consideration of the constitutional immunity from State taxation of agencies or instrumentalities of the Federal government engaged in usual or traditional governmental functions (R. 154). But the affirmance of the New York Court of Appeals was without opinion and, while we may surmise that

* Folio references are to Record in the Court of Appeals.

its decision was based upon the same ground, we are left to conjecture as to the actual basis of its decision.

Lynch v. *New York ex rel. Pierson,* 293 U. S. 52.

In both State courts, there was presented the non-Federal question whether appellant actually was an officer or employee of the Panama Railroad Company, or merely an independent contractor, since the record was silent with respect to his tenure of office, the mode and manner of his appointment, what other professional activities he conducted, whether he engaged in the general practice of law in addition to his duties for the Company or the degree of control over his activities exercised by the Company. Were appellant held to be an independent contractor rather than an officer or employee of the Panama Railroad Company, his compensation would, beyond any question, be subject to State income taxation since he was, concededly, a resident of New York.

Burnet v. *McDonough,* 46 F. (2d) 944;
Metcalf & Eddy v. *Mitchell,* 269 U. S. 514;
Lucas v. *Reed,* 281 U. S. 699;
Commissioner v. *Modjeski,* 75 F. (2d) 468, certiorari denied, 295 U. S. 764.

Candor compels the statement, on our part, that this question was not strenuously urged; nevertheless, the question was presented and, in the absence of any opinion, it is possible that the Court of Appeals affirmance rested thereon rather than upon the question of the constitutional immunity of Federal agencies from State taxation.

State Statute Involved.

This cause involved the application of Article 16 of the Tax Law of the State of New York (Ch. 60 of the Consolidated Laws) which, by § 351, imposes upon every resi-

dent of the State an income tax upon his entire net income at graduated rates. By § 359-f, the salaries, wages and other compensation paid by the United States to its officers and employees is exempted from the application of the tax.

Appellant did not invoke this statutory exemption but rested his claim upon the constitutional doctrine that agencies and instrumentalities of the United States are immune from State taxation (R. 10, 154).

Appellant contended in the courts below, and now contends (Point 7, Statement as to Jurisdiction), that the Panama Rail Road Company is a wholly owned instrumentality of the United States and, hence, exempt from State taxation; and, the Company being so exempt, the salaries paid its officers and employees are likewise so exempt from State taxation.

The Appellate Division upheld the contention of appellees that the real point at issue was whether the Panama Rail Road Company was engaged in the conduct of either an essential or usual governmental function. The Court concluded (R. 170-172):

> "It seems clear to us that the Panama Rail Road Company is a government-controlled corporate agency engaged in a commercial proprietary function. This case must be decided upon the principles laid down in *South Carolina* v. *United States, supra, Ohio* v. *Helvering, supra,* and *Helvering* v. *Powers, supra.* Assuredly, the ownership and operations of stores, hotels and dairies is akin to the operation of liquor stores; and the operation of a steamship line and a railroad comparable to the operation of a street railway. And this particularly where such operation is in continuation and expansion of earlier private, commercial operation. The commercial nature of the functions of the Panama Rail Road Company are further marked by the fact that its operations are profitable and yield dividends to its stockholder, the United States. These operations constitute an activity to which, unquestionably, the

taxing power of the State would normally extend. Under the decision in *Helvering* v. *Powers, supra,* the Federal Government cannot withdraw sources of revenues from a State by engaging in a business which constitutes a departure from usual governmental functions and to which the State's taxing power would normally extend."

As we have indicated, the unanimous determination of the Appellate Division was unanimously affirmed, without opinion, by the Court of Appeals.

Motion to Dismiss or Affirm.

IF A FEDERAL QUESTION IS HERE PRESENTED, IT IS NOT SO SUBSTANTIAL AS TO MERIT REVIEW BY THIS HONORABLE COURT.

The Panama Rail Road Company is a New York corporation created by Chapter 284 of the Laws of 1849 (R. 72). Its entire capital stock (except director's qualifying shares) is owned by the United States, the Secretary of War being stockholder of record (R. 65). It conducts a general transportation business and has its principal place of business at the City of New York (R. 50). There, it has about one hundred office employees, in addition to dock engineers, cargo checkers, freight clerks and passenger agents (R. 53). It operates a line of steamships between New York and the Canal Zone, carrying passengers and cargo (R. 57-58), and its tariffs correspond to those of competing private carriers (R. 61). It also operates a railroad across the Isthmus of Panama, a commissary establishment, a dairy and two hotels (R. 74). The Company has been operating at a profit and has been paying dividends (R. 59). Its employees are paid directly by the Company from moneys derived from its operations (R. 63).

Appellant was employed by the Company as General Counsel at an annual salary of $15,000. In filing resident

income returns for the calendar years 1927, 1928 and 1929, appellant acknowledged receipt of such income, but did not include it as part of his gross income. Assessments for the tax computed thereon were made by the State Tax Commission (R. 40-42).

For a great many years prior to its acquisition by the United States, the Panama Rail Road Company was operated as a private, commercial enterprise and yielded taxes to the State of New York. Thus, in *People ex rel. Western U. Tel. Co.* v. *Roberts*, 30 App. Div. 78, it was said:

> "The Panama Railroad Company is a domestic corporation, organized in 1849, and is subject to the franchise tax imposed by chapter 542 of the laws of 1880, and the acts amendatory thereof or supplemental thereto. Under these laws, prior to 1889, *the company had been assessed and had paid into the state treasury a large amount of taxes.*" (Italics ours.)

The approach of courts familiar with Canal Zone affairs indicates that, in many respects, it continued to be treated as an ordinary private corporation in suits brought by or against it.

Panama Railroad Co. v. *Bosse*, 239 Fed. 303, affirmed 249 U. S. 41;
Panama Railroad Co. v. *Curran*, 256 Fed. 768;
Panama Railroad Co. v. *Minnix*, 282 Fed. 47;
Salas v. *United States*, 234 Fed. 842.

It is well settled that whenever a State engages in business of a private nature, it exercises non-governmental functions and the business, though conducted by the State, is not immune from Federal taxation.

Ohio v. *Helvering*, 292 U. S. 360;
South Carolina v. *United States*, 199 U. S. 437.

And this Honorable Court has held that a State may not withdraw sources of revenue from the Federal taxing

power by engaging in businesses which constitute a departure from usual governmental functions and to which, by reason of their nature, the Federal taxing power would normally extend.

Helvering v. *Powers,* 293 U. S. 214.

Appellant seeks to distinguish these cases (Point 8, Statement As to Jurisdiction) by urging that the United States, as a government of delegated powers, has no authority to engage in private business and, therefore, regardless of the nature of the undertaking, if done by the United States, it must be considered as a purely governmental agency, since apparently it is unthinkable that the United States could be "proceeding *ultra vires* and without warrant of law."

We think that contention is without merit and that the activities of the Federal government are to be judged by the same standard as that applied to State undertakings; with respect to the question whether they are classically, usually and traditionally governmental. This Honorable Court has repeatedly held that the immunity from taxation attaching to the usual and traditional governmental functions of either the Federal government or of the States, is mutual and complementary.

Fox Film Corp. v. *Doyal,* 286 U. S. 123, 128;

United States v. *California,* — U. S. —, decided February 3, 1936.

That being so, the decisions of this Honorable Court in *Ohio* v. *Helvering, South Carolina* v. *United States,* and *Helvering* v. *Powers,* are directly in point here and were correctly construed and applied by the State courts.

Finally, the taxation of appellant's salary could not possibly burden, hinder or embarrass the government of the United States for the reason that the United States does not pay him his salary, either directly or even remotely.

His salary is paid from the profitable operations of the Company which, after payment of all expenses, charges and salaries, yield the United States cash dividends. As was held in *Willcutts* v. *Bunn*, 282 U. S. 216, immunity from taxation cannot exist where the taxation is not a direct burden laid upon a governmental instrumentality and where there is only a remote, if any, influence upon the exercise of the functions of government.

Opinions Below.

The opinion of the Appellate Division of the Supreme Court, Third Department, is reported in 245 App. Div. 452 and is set forth in the record (R. 142-174).

No opinion was written by the Court of Appeals. The memorandum decision of that Court is reported in 271 N. Y. mem. 39 and reads as follows:

> "Order affirmed, with costs; no opinion. Concur: Crane, Ch. J., Lehman, O'Brien, Hubbs, Crouch, Loughran and Finch, J. J."

Dated June 16, 1936.

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
Attorney for Appellees,
JOSEPH M. MESNIG,
Assistant Attorney-General of
the State of New York,
Counsel for Appellees,
The Capitol, Albany, New York.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 139.

THE PEOPLE OF THE STATE OF NEW YORK
upon the relation of RICHARD REID ROGERS,
APPELLANT,
AGAINST
MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,
APPELLEES.

APPEAL FROM THE SUPREME COURT, ALBANY COUNTY, STATE OF NEW YORK.

BRIEF FOR APPELLEES.

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Attorney-General,
Attorney for Appellees.

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HENRY EPSTEIN,
Solicitor General,
Counsel for Appellees.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 139.

THE PEOPLE OF THE STATE OF NEW YORK upon the relation of RICHARD REID ROGERS,

APPELLANT,

AGAINST

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

APPELLEES.

BRIEF FOR APPELLEES.

Statement.

This cause comes to this Honorable Court, on appeal from a final order and judgment of the Supreme Court of the State of New York, pursuant to the provisions of Section 237-a of the Judicial Code, as amended. The final order and judgment appealed from (R. 63) was duly entered on May 2, 1936, in the office of the Clerk of Albany County, upon the remittitur of the Court of Appeals (R. 61) bearing date April 29, 1936.

The questions presented are (1) the jurisdiction of the Court and (2) whether or not the Panama Rail

Road Company is engaged in the conduct of a usual governmental function for the Federal government, so as to render immune from State taxation the salaries of its officers and employees.

Official Report of Opinions Below.

The opinion of Mr. Justice Heffernan, writing for the Appellate Division of the Supreme Court, Third Judicial Department, is reported in 245 App. Div. 452 (R. 48-58). No opinion was written by the Court of Appeals (R. 63). The memorandum decision of the Court of Appeals is reported in 271 N. Y. (mem.) 39.

Statement of Facts.

Appellant, a New York resident, was employed by the Panama Rail Road Company as general counsel at an annnual salary of $15,000. In filing his New York State income tax returns for the calendar years 1927, 1928 and 1929, he acknowledged receipt of this income, but did not include it as part of his gross income for tax purposes. Additional assessments of tax computed thereon were made by appellees (R. 14-15).

The Panama Rail Road Company is a New York corporation (Ch. 284, Laws of 1849) whose entire capital stock has been acquired by the United States (R. 24-25). The company conducts a general transportation business and has its principal office in the City of New York (R. 17). At New York City it has about one hundred office employees, in addition to dock engineers, cargo checkers, freight clerks and passenger agents (R. 18). It operates a line of steamships be-

tween New York and the Canal Zone (R. 19-20), carrying passengers and freight. Its steamers have also operated to Haiti and South America (R. 17-18). The ships engaged in commercial business and the company's tariffs correspond to those of competing private carriers (R. 21). It carries government freight and employees at reduced rates (R. 20).

The company also operates a railroad across the Isthmus of Panama, a commissary establishment, a dairy and two hotels (R. 25).

The company is managed by a board of thirteen directors, each of whom holds one share of stock (R. 25). The directors are elected by the Secretary of War in his capacity as stockholder of record of 69,987 shares (R. 22-23). The capital stock consists of 70,000 shares of the par value of $100. (Ch. 364, Laws of 1855.)

The company has been operating at a profit and has been paying dividends (R. 20). Its officers and employees are paid directly by the company from moneys derived from the company's operations (R. 21). No liability rests upon the United States because of any claims for damages which might lie against the company (R. 22).

Summary of Argument.

I. The record does not show that a substantial Federal question was expressly or necessarily decided by the State Court.

II. The Panama Rail Road Company is not an instrumentality of the United States engaged in

the conduct of a usual or traditional governmental function.

A. Immunity from taxation extends only to agencies and instrumentalities engaged in usual or traditional governmental functions.

B. The functions of the Panama Rail Road Company are not traditionally or usually governmental but are commercial and proprietary.

III. Conclusion—

The Position of the State of New York.

ARGUMENT.

I.

The record does not show that a substantial Federal question was expressly or necessarily decided by the State Court.

The decision of the Appellate Division of the Supreme Court, Third Department, undoubtedly rested upon a consideration of the constitutional immunity from State taxation of agencies or instrumentalities of the Federal government engaged in the conduct of usual or traditional governmental functions. But the affirmance of the Court of Appeals was without opinion and, while we may surmise that its decision was based upon the same ground, we are left to conjecture as to the actual basis of its decision.

Lynch v. New York ex rel. Pierson, 293 U. S. 52.

In the State courts, the question was raised whether appellant actually was an officer or employee of the Panama Rail Road Company, or merely an independent contractor since the record was completely silent with respect to such matters as tenure of office, the mode and manner of his appointment, what other professional activities he conducted, whether he engaged in the general practice of law in addition to his duties for the Company or the degree of control over his activities exercised by the company. Were appellant properly held to be an independent contractor rather than an officer or employee of the company, it is so well settled that his compensation would, beyond any doubt, be subject to a State income tax that, in such circumstances, we believe no substantial Federal question would be here presented.

Burnet v. McDonough, 46 Fed. (2nd) 944;
Commissioner v. Modjeski, 75 Fed. (2nd) 468, cert. denied 295 U. S. 764;
Pease v. Commissioner, 83 Fed. (2nd) 122;
Metcalf & Eddy v. Mitchell, 269 U. S. 514;
Lucas v. Reed, 281 U. S. 699.

For jurisdiction to exist in this Court, it must appear affirmatively, not only that a substantial Federal question was presented, but that the decision of such a Federal question was necessary to a determination of the cause, that such Federal question actually was decided, or that the judgment as rendered could not have been given without deciding it.

Judicial Code, §237 (a);
28 U. S. C. A. §344 (a); 45 Stat. 54;
28 U. S. C. A. §861 (a).
Williams v. Oliver, 53 U. S. 111, 124;
Whitney v. California, 274 U. S. 357, 360.

It is true, as appellant says in his brief, that we urged a determination upon the main question in the courts below and we join with appellant in urging such a determination here. But we would feel remiss were we to fail in calling the attention of the Court to what we believe to be a deficiency in the record.

II.

The Panama Railroad Company is not an instrumentality of the United States engaged in the conduct of a usual or traditional governmental function.

A. Immunity from taxation extends only to agencies and instrumentalities engaged in usual or traditional governmental functions.

Section 359-f of the Tax Law provides for an exemption from the application of the New York Personal Income Tax (Art. 16, Tax Law) in the case of salaries, wages and other compensation paid by the United States to its officers and employees. Appellant, contending for the income tax exemption of his salary, has not invoked this statutory exemption, but rests his claim upon the fundamental, constitutional doctrine that the governmental instrumentalities and agencies of the Federal government and the various state governments are mutually immune from taxation by the other.

The doctrine is thoroughly imbedded in our jurisprudence that a state is without power to tax the property of the governmental agencies or instrumentalities

of the United States. Similarly, the Federal government lacks power to tax State property or agencies.

In *Van Brocklin v. Tennessee*, 117 U. S. 151, at p. 178, Mr. Justice Gray said:

> "The reasons for exempting all the property and income of a State, or of a municipal corporation, which is a political division of the State, from federal taxation, equally require the exemption of all the property and income of the national government from State taxation."

See also:

McCulloch v. Maryland, 4 Wheat. 436;
Collector v. Day, 11 Wall. 113.

Thus, in *Railroad Company v. Peniston*, 18 Wall. 5, Mr. Justice Strong said, at p. 30:

> "There are, we admit, certain subjects of taxation which are withdrawn from the power of the States, not by any direct or express provision of the Federal Constitution, but by what may be regarded as its necessary implications. They grow out of our complex system of government, and out of the fact that the authority of the National government is legitimately exercised within the States. While it is true *that* government cannot exercise its power of taxation so as to destroy the State governments, or embarrass their lawful action, it is equally true that the States may not levy taxes the direct effect of which shall be to hinder the exercise of any powers which belong to the National government. The Constitution contemplates that none of those powers may be restrained by State legislation. But it is often a difficult question whether a tax imposed by a State does in fact invade the domain of the General government, or interfere with its operations to such an extent, or in such a manner, as to render it unwar-

> ranted. *It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution.* To hold that would be to deny to the States all power to tax persons or property." (Italics ours.)

And in the same case (p. 36) this Court said:

> "It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, *or upon the fact that they are agents,* but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power." (Italics ours.)

It was held in this case that a State tax upon the property of the Union Pacific Railroad Company, as distinguished from a tax on its franchises, did not deprive the railroad of its power to serve the government as it was intended to serve it, or hinder the efficient exercise of its power. (Its franchise had been granted by Congress.)

Concerning State taxation of franchises granted by the Federal government, compare *Fox Film Corp. v. Doyal,* 286 U. S. 123, where this Court reversed earlier decisions holding patents and copyrights immune from State taxation.

In that case Mr. Chief Justice Hughes said (p. 128):

> "The principle of the immunity from State taxation of instrumentalities of the Federal Government, and of the corresponding immunity of state instrumentalities from Federal taxation—essential

to the maintenance of our dual system—has its inherent limitations. It is aimed at the protection of the operations of government *(McCulloch v. Maryland*, 4 Wheat. 316, 436), and the immunity does not extend 'to anything lying outside or beyond governmental functions and their exertions.' *Indian Motorcycle Co. v. United States,* 283 U. S. 570, 576, 579. Where the immunity exists, it is absolute, resting upon an 'entire absence of power' *(Johnson v. Maryland,* 254 U. S. 51, 55, 56), but it does not exist 'where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government'. *Wilcuts v. Bunn,* 282 U. S. 216, 225."

In *South Carolina v. United States*, 199 U. S. 437, it was held that the exemption of State agencies and instrumentalities from Federal taxation is limited to those which are of a strictly governmental character, and does not extend to those used by the State in carrying on an ordinary private business.

Thus, Mr. Justice Brewer said (p. 463):

"Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing exercises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet whenever a State engages *in a business which is of a private nature* that business is not withdrawn from the taxing power of the Nation." (Italics ours.)

A question very similar to that presented in *South Carolina v. United States, supra,* was decided by this Court in *Ohio v. Helvering,* 292 U. S. 360. The Court reiterated the principle that whenever a state engages in a business of a private nature, it exercises non-governmental functions and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress.

In *Flint v. Stone Tracy,* 220 U. S. 108, at page 172, Mr. Justice Day said:

> "It is no part of the essential governmental functions of a state to provide *means of transportation,* supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations and though the public may derive a benefit from such operations, the companies carrying on such enterprises are, nevertheless, private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred." (Italics ours.)

As was said in *Commissioner v. Modjeski,* 75 Fed. (2nd) 468, *infra,* the *Flint* case is authority for the doctrine that only interference with essentially governmental functions can be unconstitutional.

In the decisions which we have cited thus far, the courts were concerned with the question whether or not the activity sought to be subjected to taxation was the exercise of a governmental function. Where it was found to be such a governmental function, it was held to be immune from taxation, since to permit it to be

taxed would be a restraint upon and an embarrassment of the means of government.

The ever widening activities of government made it inevitable that the question should again be presented to this Court and in 1934 *(Helvering v. Powers,* 293 U. S. 214) there was presented the question whether the compensation of the members of the board of trustees of the Boston Elevated Railway Company was constitutionally exempt from the imposition of the Federal income tax, immunity being claimed upon the ground that the trustees were officers of the Commonwealth of Massachusetts and instrumentalities of its government. It appeared that the railway company encountered financial difficulties and, by act of the Massachusetts Legislature, agreed to by the company, was taken over by the State to be publicly operated and managed for a limited period of time. It was not disputed that the trustees who were to manage the company were officers of the State and that their salaries were fixed by the Legislature, though they were to be paid from the operations of the company. The Supreme Court of Massachusetts had previously been called upon to interpret the act in question and had characterized the operation of the railway by the State as being "undertaken by the Commonwealth, not as a source of profit, but solely for the general welfare".

This Court held that the salaries of the trustees were not constitutionally immune from the imposition of the Federal income tax. Mr. Chief Justice Hughes said, page 223:

> "While the undertaking is for the public benefit, it is still a particular business enterprise—the op-

> eration of a street railway—and the functions of the trustees are limited accordingly. The property remains in private ownership. The Act, accepted by the Company, constitutes in substance an agreement between the Company and the Commonwealth that the latter shall temporarily take over the management and operation and pay specified amounts by way of compensation. While the Commonwealth may be called upon to bear losses that may occur, if the fares as fixed prove to be insufficient, the operation by the trustees is intended to be self-sustaining. The transportation service is to be rendered, as respondents' counsel say, 'under such a flexible system of rate-making as would allow the fixing of fares equal, as nearly as might be, to the cost of service.' The compensation of the trustees is undoubtedly a part of that cost."

And again, speaking of limitations upon immunity from taxation, page 225:

> "And one of these limitations is that the State cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual governmental functions and to which, by reason of their nature, the federal taxing power would normally extend.* The fact that the State has power to undertake such enterprises, and that they are undertaken for what the State conceives to be the public benefit, does not establish immunity." (Italics ours.)

And finally, page 227:

> "We see no reason for putting the operation of a street railway in a different category from the sale of liquors. In each case, the State, with its own conception of public advantage, is undertaking a business enterprise of a sort that is *normally within the reach of the federal taxing power and is distinct from the usual governmental functions* that are immune from federal taxation in order to safeguard the necessary independence of the State.

If, in the instant case, the Commonwealth had acquired the property of the Company and had organized management of it in perpetuity by the state government, instead of temporarily, or had taken over all the street railways in all its cities for direct operation by the Commonwealth, there would appear to be no ground, under the principles established by the decisions we have cited, for holding that this would effect the withdrawal of the enterprise from the federal taxing power. And the fact that the State has here undertaken public management and operation for a limited time, and under the particular restrictions of the agreement with the Company, cannot be said to furnish a ground for immunity.

"If the business itself, by reason of its character, is not immune, although undertaken by the State, from a federal excise tax upon its operations, upon what ground can it be said that the compensation of those who conduct the enterprise for the State is exempt from a federal income tax? Their compensation, whether paid out of the returns from the business or otherwise, can have no quality, so far as the federal taxing power is concerned, superior to that of the enterprise in which the compensated service is rendered.

"We conclude that the Congress had the constitutional authority to lay the tax." (Italics ours.)

There followed the decision of the Circuit Court of Appeals, Second Circuit, in *Commissioner v. Modjeski*, 75 Fed. (2nd) 468 (Cert. denied 6/3/35). In this case, Dr. Modjeski, an eminent consulting engineer in the employ of the Delaware River Joint Commission in connection with the construction of a bridge over the Delaware River, sought exemption of his salary from Federal income taxation. The Court, while discussing the question of "essential governmental functions" and "usual governmental functions" based its holding

on a finding that Dr. Modjeski was an independent contractor and, for that reason, subject to taxation. The Court said, page 470:

> "Whether the commission was a governmental agency engaged in the exercise of a *usual governmental function* or merely carrying on the ministerial or proprietary functions for inhabitants of the interested states, we need not decide." (Italics ours.)

The question whether the creation of port facilities, the building of bridges, highways and tunnels were essential or usual governmental functions, which was avoided in the *Modjeski* case, *supra,* was squarely presented and decided by the same Court in *Commissioner v. Ten Eyck,* 76 Fed. (2nd) 515, a case involving the Federal taxation of the salary of the chairman of the Albany Port District Commission. The Court reviewed in detail the creation, the powers and the activities of the Commission. It found that the construction of port and harbor or terminal developments and facilities were, classically and historically, governmental functions, usually conducted by governmental agencies. The Court said:

> "The commission, in the instant case, a public corporation, maintaining and operating a public port, *not for profit,* is performing a usual governmental function, and is not withdrawing sources of revenue from the Federal taxing power. *It has supplanted no private business to which the Federal taxing power would normally extend.* If a private corporation performs public services for a profit, it cannot be said to be exercising governmental functions simply because of that service." (Italics ours.)

The Court reviewed the decisions of this Court in the State liquor dispensary cases, *Ohio v. Helvering,*

supra, and *South Carolina v. United States, supra*, and said:

> "It is the *entrance into a trade enterprise* that distinguishes these cases, relied upon by the petitioner [Commissioner of Internal Revenue]. It cannot be maintained that there is involved in the instant case *a trade or business, entered into for profit, constituting a proprietary enterprise.* Revenues are not profits, but revenues, like tolls collected from users of a State improvement, are merely means by which the State attempts to recoup in some part its legitimate expenses." (Italics ours.)

The Court affirmed the ruling of the United States Board of Tax Appeals that the salary of the Chairman of the Albany Port District Commission was not subject to Federal taxation.

The liability to and immunity from Federal taxation of various state and municipal agencies and instrumentalities were the subject of judicial determination in:

Commissioner v. Sherman, 69 Fed. (2nd) 755;
Commissioner v. Harlan, 80 Fed. (2nd) 660;
Childers v. Commissioner, 80 Fed. (2nd) 27;
Devlin v. Commissioner, 82 Fed. (2nd) 731;
Hoskins v. Commissioner, 84 Fed. (2nd) 627;
Commissioner v. Brush, 85 Fed. (2nd) ..., petition for certiorari pending;
City of Galveston v. United States, 10 Fed. Supp. 810, 822.

In a decision handed down on October 28, 1936, the United States Board of Tax Appeals in *Case v. Commissioner*, 34 B. T. A. ..., reviewed and reversed the

action of the Commissioner of Internal Revenue in assessing an income tax upon the salaries of employees of the Port of New York Authority. Referring to the *Modjeski, Ten Eyck* and *Harlan* cases, the Board remarks that "the Government says that for one reason or another each of those decisions lacks authoritative force to control the general question." Wherein these decisions fall short as authority, we fail to see. The Board reviewed in detail the activities conducted by the Port of New York Authority and concluded:

> "We hold that the Port Authority is engaged in the performance of a sovereign function of each of the states of New York and New Jersey and that the compensation received by its employees is exempt from the Federal income tax."

The decision seems logically to follow the determination in *Commissioner v. Ten Eyck, supra,* since the Port Authority is the instrumentality through which the States of New York and New Jersey function in providing integrated facilities, for the Port of New York such as bridges and tunnels, highway approaches and terminal facilities, all clearly in the exercise of usual governmental functions.

Thus, we submit that it is well settled that the restriction upon the taxing power of the State, with respect to agencies or instrumentalities of the Federal government, applies only to such activities as are usually, classically and traditionally governmental.

This principle was recently reasserted by this Court in *United States v. California,* 297 U. S. 175, in the following language:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on

which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation *traditionally* within it. *Helvering v. Powers*, 293 U. S. 214, 225; *Ohio v. Helvering*, 292 U. S. 360; *South Carolina v. United States*, 199 U. S. 437; see *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 173, explaining *South Carolina v. United States, supra.* Hence we look to the activities in which the states have *traditionally* engaged as marking the boundary of the restriction upon the federal taxing power." (Italics ours.)

We submit, that to be successful in this proceeding, appellant must convince this Court that the Panama Rail Road Company is engaged in the exercise or pursuit of a function not only governmental, but one *usually or traditionally so.*

B. The functions of the Panama Rail Road Company are not traditionally or usually governmental but are commercial and proprietary.

The Panama Rail Road Company is a corporation formed by a special act of the New York Legislature (Ch. 284, Laws of 1849). That act authorized certain named individuals to form a corporation to be known as Panama Rail Road Company, with a capital stock of not to exceed $5,000,000 for the purpose of constructing and operating a railroad across the Isthmus of

Panama under a grant made to three named individuals by the then Republic of New Grenada. As an incidental power it was authorized to own and operate steamships. Six years later it was granted certain additional powers and permitted to increase its capitalization to an amount not to exceed $7,000,000 (Ch. 364, Laws of 1855), its present capitalization.

So far as appears from the record in this case, it was apparently privately owned and operated for some fifty-five years, until the capital stock of the company was acquired by the United States. That its commercial and proprietary character was to be continued is strikingly attested by the communication which President Theodore Roosevelt addressed to the then Secretary of War, dated May 9, 1904. Mr. Roosevelt expressed a desire "that the policy of the road be completely harmonized with the policy of the Government of making it an adjunct to the *construction* of the canal, *at the same time fulfilling the purpose for which it was constructed as a route of commercial movement across the Isthmus of Panama*" (R. 33). (Italics ours.)

Assuredly the railroad was originally conceived, constructed and operated as a private commercial, profit-making enterprise. We submit it has preponderantly retained that character to the present day.

It has added to its commercial activities the operation of two hotels, a dairy farm, a commissary establishment (stores) and certain bus lines. With respect to at least the last named activity, it has been suggested that it was beyond the corporation's charter powers.

Panama R. R. Co. v. Bosse, 249 U. S. 41, 47.

In competition with privately owned ocean carriers, the corporation operates a fleet of steamships between New York and the Canal Zone, maintaining a complete staff of over one hundred employees at New York City. It solicits and accepts commercial freight and passenger business, carrying government freight and passenger business at reduced rates. Under the provisions of section 4 of the Intercoastal Shipping Act of 1933 (46 U. S. C. A. 846) private carriers were authorized to allow similar reduced rates. Its ships have also at some time operated to Haiti and South America, apparently having withdrawn from these services upon protest by competing privately owned carriers (R. 39).

We have carefully examined opposing counsel's brief for a citation to the effect that the operation of steamships, a railroad, stores, hotels or dairies could have any suggestion of a governmental function. Needless to say, we found none. Common sense compels the conclusion that such activities are intrinsically, traditionally and historically of a commercial and proprietary nature. And this is further reinforced when it is considered that the particular activities here in question have a background of fifty-five years of private, commercial operation.

It would seem that, if the operations of the Panama Rail Road Company can be justified as usual and traditional functions of government, the Federal government would be justified in taking over and operating, as tax-free enterprises, commercial steamship lines to Hawaii, Guam or any other island possession, commercial airlines to Alaska, or the railroads which serve any of the naval yards or military depots in the country.

Surely, such undertakings would be considered without the realm of usual or traditional functions of government; equally so, we believe, are the activities carried on by the Panama Rail Road Company.

Counsel urges that the operation of the Company's steamers is not primarily for the purpose of engaging in commercial competition with other steamship lines and intimates that the same is true of the other activities of the Company and that, therefore, immunity from State taxation must follow. But, in *South Carolina v. United States, supra,* and *Ohio v. Helvering, supra,* the State did not engage in the liquor business primarily for profit, but rather as a regulatory means; and in *Helvering v. Powers, supra,* the State did not go in the street railway business primarily for profit but solely, as a temporary expedient, for the public welfare. Yet because the particular undertaking was a business enterprise and a departure from usual governmental functions, Federal tax immunity was denied. For the same reason, we submit, immunity from State taxation was properly denied here.

The approach of Courts familiar with Canal Zone affairs further supports our argument. The company has been treated as an ordinary private corporation in suits brought against it. Thus, in *Panama Railroad Co. v. Bosse,* 239 Fed. 303, affirmed 249 U. S. 41, in stating the facts of the case, the Court said:

> "The plaintiff in error, a corporation organized under the laws of the State of New York, was operating motorbusses between the town of Balboa and the city of Panama in the month of July, 1916 * * *."

And in *Panama Railroad Co. v. Curran,* 256 Fed. 768, the Circuit Court of Appeals emphasized the private, non-governmental character of the Company. The Court said, page 772:

> "Departmental regulations and rulings indicate that it has been recognized that a purpose of preserving the corporate existence and organization was to make inapplicable to Panama Railroad receipts provisions requiring payment into the treasury of receipts by governmental agents. Whatever the purpose was, such legislation as that which has been mentioned shows that the lawmakers intended the relation between the government and the defendant to be that of a stockholder to the corporation which issued the stock, *and not that of principal and agent.* This being true, the following statements made in the opinion of Chief Justice Marshall, in the case of *Bank of the United States v. Planters' Bank,* 9 Wheat 904, 6 L. Ed. 244, are applicable to the facts of the instant case:
>
> 'The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The state does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the state holds an interest in it. *It is we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.* Thus many states of this Union who have an interest in banks are not suitable even in their own courts; yet they never exempt the corporation from being sued. The state of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its

> sovereign character, so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.'
>
> From the fact that one owns all the stock of a private corporation it does not follow that the acts of the corporation are to be treated, not as its acts, but as the acts of its sole stockholder. *Pullman Palace Car. Co. v. Missouri Pacific R. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. Ed. 1113; *Salas v. United States*, 234 Fed. 842, 148 C. C. A. 440. The defendant was not, on the ground mentioned, exempt from the liability asserted against it." (Italics ours.)

The liability of the Company to suit, as any other railroad company, and its property to seizure, is not affected by the fact that the United States is sole stockholder.

Panama R. Co. v. Minnix, 282 Fed. 47.

Whether the acts of certain individuals to defraud the Panama Railroad Company could constitute a conspiracy to defraud the United States was considered in *Salas v. United States*, 234 Fed. 842. The Court held that the combination proved did not defraud or intend to defraud the United States.

The Court said, page 844:

> "The theory of the United States is that the Panama Railroad Company is a governmental department, and Burke, though on the payroll of and paid by that company, was an officer of the United States. The trial judge so held as matter of law.

> The Isthmian Canal Commission was an agency of the United States under the supervision of the War Department, having complete control of the building of the canal. The United States was also the owner of the whole capital stock of the railroad company, absolutely dominating it and solely interested in its profits or losses. The government, however, continued the original corporate organization of the railroad company for its own purposes, among others to avoid the restrictions of certain laws of the United States applicable to the Commission. Accordingly there was created a department called the 'subsistence department' composed of the labor, quarters, and subsistence department of the Commission which furnished all food supplies to the employees on the Isthmus and the commissary department of the Panama Railroad Company, which bought, carried, and furnished all other merchandise and supplies. Burke was the manager of the latter. *When the United States enters into commercial business it abandons its sovereign capacity and is to be treated like any other corporation.*" (Italics ours.)

That Congress regards the property of the Panama Railroad Company as distinct from property of the United States and from property owned by other wholly owned corporations is manifested by the exception of the vessels of the Company from the Suits in Admiralty Act of March 9, 1920. Section 1 of that Act reads:

> "No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel *in personam*, be subject to arrest or seizure by judicial process in the

> United States or its possessions: *Provided, That this chapter shall not apply to the Panama Railroad Company.*" (Italics ours.) (Mar. 9, 1920, C. 95, §1, 41 Stat. 525, 46 U. S. C. A. 741.)

The United States Employees Compensation Act of September 7, 1916, was enacted to provide compensation for employees of the United States suffering injuries in the performance of their duties. The act provides:

> "The term 'employee' includes all civil employees of the United States and of the Panama Railroad Company." (Sept. 7, 1916, C. 458, §40; 39 Stat. 750; 5 U. S. C. A. 790.)

Commenting on this provision the Court said in *Panama R. Co. v. Minnix*, 282 Fed. 47, *supra*, at page 49:

> "The employees are recognized by the act itself as being those of that corporation. *It took an express provision of the Compensation Act to extend its benefits to them.*" (Italics ours.)

Section 41 of the Act (5 U. S. C. A. 791) requires that no compensation shall be paid an employee of the Panama Railroad Company for injuries or death under circumstances creating legal liability in the Company to pay damages therefor until the employee releases any claim for such liability or assigns his claim to the United States.

Opposing counsel refers (p. 9 Brief) to the Federal Act of March 2, 1931, providing for a compensation and retirement system (48 U. S. C. A. 1371 *et seq.*). We fail to see the relevancy of that act here since, by its terms, it applies only to "employees of the Panama Railroad

Company, *on the Isthmus of Panama*, * * *." Appellant is not comprehended under the act since he is not an employee "on the Isthmus of Panama".

It may be pertinent to add that the various hearings held on the bill, which became the Act just referred to, indicate that there was considerable doubt as to the legality of imposing a retirement plan "on people who are not employees of the Government", but the fact that both Canal employees and Company employees were subject to the same unhealthy climate and that both groups had been interchanged continually in the early days of the Canal's construction led to the creation of one retirement system for both. (Hearing before Committee on Interstate and Foreign Commerce of the House of Representatives held December 28, 1929; March 3, 6, 27, 1930.)

Counsel also refers to the Temporary Economy Act of 1932 (p. 9 Brief) and says that pursuant thereto the President of the United States, by order dated July 25, 1932, effected a monthly reduction in the monthly pay and salaries of the employees of the Company. The Act was, however, amended in 1933 (5 U. S. C. A. 673, note) by entirely excepting from the Act "officers and employees of the Panama Canal and Panama Railroad Company on the Isthmus of Panama" (§215 [5 U. S. C. A. 30a] as amended) and, with respect to the remaining officers and employees by directing that the proper parties in charge of the corporation "take such action as may be necessary to apply the provisions of this title to officers, positions, and employment under such corporation and to officers and employees thereof * * *." It seems necessarily to

follow that any reduction in compensation paid to officers or employees of the Panama Railroad Company must be effected by action of the board of directors of the Company.

In any event, counsel's reference to the several Acts of Congress enacted with respect to the Company have no particular relevancy here. They represent nothing further than the natural interest which any proprietor takes in an important and profitable commercial enterprise. We cannot appreciate where these references will, in any wise, aid this court in determining whether the Company engages in a usual or essential governmental function. Nor are the references to various rulings and conclusions of Federal officials and bureaus of more than incidental interest. It is, for example, interesting to note that one important Federal department, the U. S. Shipping Board, charged with the responsibility of developing an American Merchant Marine generally, urged that the steamship services of the Panama Railroad Company be abandoned, presumably because of the unfair competition of this government-owned service with existing privately-owned ocean carriers.

Counsel suggests (pp. 25-26 of Brief) the existence of a double standard whereby the functions and activities of the Federal government, with respect to immunity from State taxation, must be considered on an entirely different basis than similar functions and activities of a State where immunity from Federal taxation is in question. It is said that a State may legally engage in a proprietary undertaking, whereas the Federal government may not, except it proceed "*ultra*

vires and without warrant of law" and that such latter conclusion may not be indulged.

We submit that this argument is without merit and runs counter to views long held and repeatedly announced by this Court to the effect that, because of the dual form of our government, the immunity from State taxation enjoyed by the usual governmental functions of the Federal government and the corresponding immunity of similar State functions from Federal taxation, are reciprocal and complementary. There is no basis or authority in law for considering one or the other by a different standard.

Collector v. Day, 11 Wall 113, 127, *supra;*
Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 584;
Ambrosini v. United States, 187 U. S. 1, 7;
Indian Motocycle Co. v. United States, 283 U. S. 570, 579;
Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 400;
Trinity Farm Const. Co. v. Grosjean, 291 U. S. 466, 471;
United States v. California, 297 U. S. 175, *supra.*

We believe we have demonstrated that the Panama Railroad Company is a government-controlled corporate agency engaged in a commercial proprietary function. We urge that this case should be decided upon the principles laid down in the state liquor dispensary cases, *South Carolina v. United States, supra,* and *Ohio v. Helvering, supra,* and the Boston Elevated case, *Helvering v. Powers, supra.* Assuredly, the own-

ership and operation of stores, hotels and dairies is akin to the operation of liquor stores; and the operation of a steamship line and a railroad comparable to the operation of a street railway. *And this particularly where such operation is in continuation and expansion of earlier private commercial operation.* The commercial nature of the functions of the Panama Railroad Company are further marked by the fact that its operations are profitable and yield dividends to its stockholder, the United States.

These operations constitute an activity to which, unquestionably, the taxing power of the State normally would extend. Under the decision in *Helvering v. Powers, supra,* the Federal government cannot withdraw sources of revenues from a State by engaging in a business which constitutes a departure from usual governmental functions and to which the State's taxing power would normally extend.

Upon the subjection of the Panama Railroad Company to State taxation, see *People ex rel. Western U. Tel. Co. v. Roberts,* 30 App. Div. 78, wherein the Court said:

> "The Panama Railroad Company is a domestic corporation, organized in 1849, and is subject to the franchise tax imposed by chapter 542 of the laws of 1880, and the acts amendatory thereof or supplemental thereto. Under these laws, prior to 1889, *the company had been assessed and had paid into the state treasury a large amount of taxes.*" (Italics ours.)

In *Commissioner v. Ten Eyck, supra,* the government sought to tax the salary of the Chairman of the Albany Port District Commission, a public corporation *ex-*

pressly formed to construct and maintain, *not for profit*, port, harbor and terminal facilities as a link in the waterway development from the Atlantic to the Great Lakes. Very plainly such a tax would burden and impede an essential and usual governmental function of the State.

Here, an entirely different situation prevails. Paraphrasing the words of the Court in the *Ten Eyck* case, it may be said that here the government has not only "supplanted" but has acquired and continued a "private business to which the state taxing power would normally extend". Taxing appellant's salary could not burden, hinder or embarrass the government of the United States for the simple and sufficient reason that the United States does not pay him his salary, either directly or even remotely. His salary is paid from the profitable operations of the corporation which after payment of all salaries and charges, yield the United States cash dividends. As was held in Wilcuts v. Bunn, 282 U. S. 216, immunity from taxation cannot exist where the taxation is not a direct burden laid upon a governmental instrumentality and where there is only a remote, if any, influence upon the exercise of the functions of government.

III.

CONCLUSION

The position of the State of New York.

We feel that it is desirable, in view of the vital implications of the instant case, that the State of New

York make its position clear, in respect of this and other cases involving a similar question, some of which may very well come before this Court for final determination. As we have indicated, there have been several, the *Ten Eyck, Harlan* and *Sherman* cases, *supra,* where the determination was adverse to the Government and no appeal to this Court was taken. Nevertheless, the government denies the authority of those cases as determinative of the question.

Cases now pending seem to us to involve efforts to subject to Federal taxation, functions that long have been accepted as usually and traditionally the province of the State or its municipal corporations. Thus, in *Case v. Commissioner, supra,* the government is seeking to subject to Federal tax the activities of the Port of New York Authority, and in *Brush v. Commissioner, supra,* the function of supplying New York City with water is sought to be taxed by the government.

The State of New York has opposed and intends to oppose the government's contentions in those cases. In so doing, it believes its position in the instant case to be entirely justifiable and consistent. In those activities of the State and its public corporations, agencies and political subdivisions, which are and have been of a characteristic, usual and traditional governmental character, the State intends to press for a determination favorable to their immunity from Federal taxation.

We have no desire to enlarge the scope of *Helvering v. Powers, supra,* but rather to hew close to the principles there laid down by this Court. It is because of

the proponderantly commercial character of the activities of the Panama Rail Road Company that we press the reasonableness of the State's position in the instant case.

If this Court should conclude that those corporate functions and activities are essential to and usually associated with the operation of a canal or the national defense, the State must concede immunity from taxation. Such, we submit however, is not the case.

The mutual and complementary immunity from taxation of State and Federal instrumentalities of government is implicit in our constitutional form of government and is founded in the doctrine that power to tax is power to destroy (*McCulloch v. Maryland, supra,* 4 Wheat. 316, 427). Such immunity necessarily conflicts, to a certain extent, with what Mr. Chief Justice Marshall, in the same case (p. 425) termed the vitally important power of taxation that was retained by the States; and which was characterized by Mr. Justice Stone in *Lawrence v. State Tax Commission,* 286 U. S. 276, 279, as the "unilateral action of the state government in the *exercise of the most plenary of sovereign powers,* that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits." (Italics ours.)

It seems apparent that the principle of immunity, interfering as it does with the exercise of a vitally important, plenary sovereign power, ought only to be invoked and employed when there is a direct and imminent hindrance to, or restraint upon, functions which are unquestionably properly and usually governmental in their character.

Otherwise, little will remain beyond an ever dwindling semblance of state sovereignty, if immunity from State taxation is sought and allowed in the case of all of the constantly broadening activities of the Federal government. It may very well be proper and desirable that the United States own and operate the Panama Rail Road Company. But when the government engages in commercial, proprietary activities, acting through a corporate agency, the officers and employees of such a corporation do not have the status, for tax purposes, of officers and employees of the United States engaged in usual and traditional governmental functions.

It is respectfully submitted that the determination of the State Tax Commission assessing a tax upon appellant in the form of a non-discriminatory excise, measured by his net income, including income received as salary paid him by the Panama Rail Road Company, should be upheld.

The order and judgment of the Supreme Court of the State of New York should be affirmed.

Respectfully submitted,

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P. 5.

SUPREME COURT OF THE UNITED STATES.

No. 139.—October Term, 1936.

The People of the State of New York, upon the Relation of Richard Reid Rogers, Appellant, *vs.* Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners, Constituting the State Tax Commission of the State of New York.	Appeal from the Supreme Court of the State of New York.

[January 4, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

The relator, Richard Reid Rogers, is general counsel for the Panama Rail Road Company, a corporation created by an old statute of the State of New York for the purpose of constructing and operating a railroad across the Isthmus of Panama. In making his state income-tax return for the years 1927, 1928, and 1929, he reported the receipt of salary from the corporation during those years, but, upon the claim that the salary was exempt, paid no tax. The State Tax Commission, however, sustained the tax, and it then was paid under protest. The Appellate Division of the Supreme Court of New York, to which the case was taken by certiorari, upheld the view of the Tax Commission, 245 App. Div. 452; and the decision was affirmed by the Court of Appeals, without opinion. 271 N. Y. 543.

The ground upon which the relator claimed the exemption was that the Panama Rail Road Company was a wholly-owned instrumentality of the United States, engaged in maintaining, operating and protecting the Panama Canal; that as such, the railroad company was exempt from state taxation and, in consequence, the fixed salaries paid to its officers and employees were also exempt. The Appellate Division held that the railroad company was a government-controlled corporate agency engaged in a commercial proprietary function, and was not immune from state taxation since, it said, such taxation did not hinder or restrain "functions

which are unquestionably, properly and usually governmental in their character."

First. The corporation was privately owned and operated for many years; but in 1904, the United States acquired the entire capital stock of the corporation, and ever since has been, and now is, the sole owner thereof. The company operates a railroad across the Isthmus, conducts a commissary establishment for the benefit of the personnel of the Panama Canal, the railroad company, and the armed forces of the United States upon the Isthmus, and operates a dairy and two hotels in connection therewith. It also operates a line of steamships between New York and the Canal Zone, which ships afford the personnel of the canal and of the railroad company transportation at a nominal rate, and carry freight for the government of the United States to the Canal Zone at 25% less than the customary tariff rates.

The acquisition by the United States of the Panama Rail Road Company was coincident with its acquisition of the control of the Panama Canal Zone and the right to construct and maintain a ship canal across it. Since the acquisition of the railroad company by the government, the directors, thirteen in number, have been elected by the Secretary of War, as sole stockholder of record of the corporate stock with the exception of thirteen qualifying shares held by the directors.

During the construction of the canal, the railroad was almost exclusively employed as an adjunct of such construction, although it was incidentally used also for commercial transportation across the Isthmus. In *United States ex rel. Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, 6, we said, "For many years before the War, the Government had employed the Panama Railroad Company as its instrumentality in connection with the Canal." In a footnote following that statement, we pointed out that the stock in the railroad company was acquired in order that the railroad might be used in the manner most helpful to the government in constructing the canal, and cited public documents which sustained that view.

In order to reach a correct determination of the question whether the railroad company is exercising functions of a governmental character, the railroad and ships are to be considered not as things apart, but in their relation to the Panama Canal; and it is clear that the railroad and ships, after the completion of the canal, con-

tinued to be used chiefly as adjuncts to its management and operation. The question, therefore, to be answered is whether the canal is such an instrumentality of the federal government as to be immune from state taxation; and, if so, are the operations of the railroad company so connected with the canal as to confer upon the company a like immunity?

The authority for the construction of the canal and the acquisition of rights in connection therewith is found in the Act of Congress of June 28, 1902, c. 1302, 32 Stat. 481. By that act, the President was authorized to acquire for the United States all the rights and property of the New Panama Canal Company, of France, on the Isthmus of Panama, including the capital stock of the Panama Rail Road Company "owned by or held for the use of said canal company"; to acquire from the Republic of Colombia perpetual control of the Panama Canal Zone, a strip of land six miles in width and extending across the Isthmus; and to construct and perpetually maintain, operate, and protect thereon a ship canal, including "the right to perpetually maintain and operate the Panama Railroad." The acquisition was to include jurisdiction over the Zone and the ports at the ends thereof, and the power to make police and sanitary rules and regulations necessary to preserve order and preserve the public health thereon; and to establish judicial tribunals necessary to enforce such rules and regulations.

Section 7 of the act created a commission to carry out the purposes of the act, and authorized the employment of engineers necessary for the prosecution of the work. The commission was to be subject to the direction and control of the President, and was to make full reports of their doings, to be transmitted to Congress by the President. Section 8 authorized the Secretary of the Treasury to borrow, on the credit of the United States, such sums as might be required to defray expenditures authorized by the act, not to exceed $130,000,000, and to issue bonds of the United States as security therefor.

The Act of August 24, 1912, c. 390, § 4, 37 Stat. 560, 561; 48 U. S. C. §1305, authorized the President to govern and operate the Panama Canal and the Canal Zone through a Governor of the "Panama Canal" and other persons. The Governor was to be appointed by and with the advice and consent of the Senate, commis-

sioned for a term of four years, with an annual salary of $10,000. The Governor was to have control and jurisdiction over the Zone, which was to be held, treated and governed as an adjunct of the canal. 37 Stat. 564, §7; 48 U. S. C. §1307. Later legislation authorizes the President to make rules and regulations in matters of health, etc., and imposes penalties for their violation. 48 U. S. C. § 1310. The President is also given broad powers of police within the zone. 48 U. S. C. §§ 1312, 1313, 1314. We need not particularize further. Chapter 6, Title 48 U. S. C., discloses a large body of laws passed by Congress for the government and control of the canal, and of both the Canal Zone and the railroad company as necessary adjuncts of the canal.

That under these laws, the creation, management and operation of the canal are all governmental functions and the laws well within the constitutional power of Congress to provide for the national defense and to regulate commerce under the commerce clause of the Constitution, does not admit of doubt. *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 39; *Luxton* v. *North River Bridge Co.*, 153 U. S. 525.

The building and operation of a bridge or a road or a canal is not commerce in the substantive sense, but is the creation and use of a physical thing as a medium by and through which commerce is regulated, since such creation and use condition and facilitate transportation. *Luxton* v. *North River Bridge Co., supra,* pp. 533-534; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9, 10; cf. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 297. In recognition of the principle established by these and other decisions, this court in *Wilson* v. *Shaw*, 204 U. S. 24, 33, sustained the acquisition, construction and maintenance of the canal as within the commerce power of the federal government.

Such being the status of the canal, it requires no argument to demonstrate that all auxiliaries primarily designed and used to aid in its management and operation, and which have that effect, partake of its nature and are themselves cooperating regulators—or, perhaps more accurately speaking, constitute, with the canal, a single great regulator—of national and international commerce. And this, we think, is the effect of the interrelation of the railroad company's activities with the management and operation of the canal.

If support for this view were thought necessary, it could be found in the contemporaneous and long-continued administrative practice. On April 27, 1928, the Secetary of War, in a letter to the President, said: "The [steamship] Line is an integral part of the Panama Canal and indispensable in its discharge of its normal responsibilities. The successful operation of this great enterprise, which is of vital importance to the United States, demands absolute security as to its line of supply to this country."

Sec. 500 of the War Revenue Act of 1917 (40 Stat. 314), levied a tax upon sums paid for transportation by rail and water, but exempted (§ 502) therefrom payments received for services rendered to the United States, etc. The Commissioner of Internal Revenue held that transportation services performed for the Panama Rail Road Company fell within the exemption, on the ground that they were "in substance payments for services rendered the United States."

Art. 96, Department Regulations No. 49, revision of June, 1921, declares that transportation services rendered to agencies of the United States are exempt from the tax, and enumerates as among such agencies the Panama Rail Road Company. The commissioner had likewise held that the railroad company was not subject to the capital stock tax imposed by the Revenue Act of 1918 (40 Stat. 1126), because the company was a government agency. Again, on September 20, 1926, the Commissioner of Internal Revenue advised the company that inasmuch as it was a governmental agency, it was not required to file federal income-tax returns or to pay federal income taxes. No act of Congress suggests any different view, but all such legislation, so far as it deals with the subject, recognizes its correctness.

We attach no importance to the fact that the railroad company has utilized both its ships and railroad to carry private freight and passengers. The record shows that this is done to a limited extent compared with the government business; and that it is only incidental to the governmental operations. The primary purpose of the enterprise being legitimately governmental, its incidental use for private purposes affords no ground for objection. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 73; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 333. The first of these two cases dealt with the disposition of excess water power devel-

oped by a project to improve navigation; and the second with the disposition of surplus electric energy developed by a like project. But the principle is equally applicable to the situation here.

It is suggested that the dairy, hotels, and other enterprises, built and maintained by the company, are not governmental instrumentalities. Even if we accept that conclusion—which, in view of their use for the personnel of the railroad and canal, we are far from doing—it would not alter the fact that the railroad itself, in connection with the canal, is a federal instrumentality.

Second. The power of the federal government to use a corporation as a means to carry into effect the substantive powers granted by the Constitution has never been doubted since *McCulloch* v. *Maryland,* 4 Wheat. 316. The Panama Rail Road Company was acquired and has been utilized in virtue of that power. The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune.

In *Dobbins* v. *The Commissioners of Erie County,* 16 Pet. 435, 448-449, this court held that a state was without authority to tax the instruments, or compensation of persons, which the United States may use and employ as necessary and proper means to execute its sovereign power. The rule is well established; and the reasons upon which it is based and the authorities sustaining it have been so recently reviewed by this Court, *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575 *et seq.,* that further discussion is unnecessary.

The rule itself is not denied; but it was suggested in the court below by counsel for the state, and the suggestion was repeated here, albeit faintly, that the record does not establish whether relator was an officer or employee of the railroad company or an independent contractor. The point was not made or suggested either before the State Tax Commission or in the Appellate Division of the Supreme Court. The whole question there was whether the company was subject to taxation; and it quite evidently was taken for granted that a negative answer to that question would carry with it an exemption of relator's salary. It is conceded that the point was raised by counsel for the state for the first time in the Court of Appeals; and that in reply to a question from that bench whether he wished the case decided upon that point, counsel answered in the

negative and declared that the state wanted a decision upon the merits.

Under these circumstances, it is not surprising that the obligation of the relator to prove his case in this regard was somewhat perfunctorily discharged. The record, however, does show that relator was, and had been ever since the year 1906, general counsel for the railroad company with a fixed annual salary, in the same category in respect of the railroad company as the secretary and treasurer. We think this evidence sufficiently negatives the belated suggestion that relator may have been an independent contractor and not an officer, within the rule stated and discussed in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524-526.

Reversed and remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.